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PREFACE.

THE first edition of this book has been out of print for a considerable time; and, as the demand for it continues, I have prepared another edition. I have re-written the first two chapters, and revised and enlarged the others. I hope that the book may now be of more use to students than it was in its original form.

I have to thank my friend Mr. JOHN S. SOUTAR, Dunfermline, for revising the proof sheets and preparing the Index.

J. C.

EDINBURGH, 24*th December* 1890.

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SCOTTISH LAW OF CONVEYANCING.

SCOTTISH LAW OF CONVEYANCING.

HERITABLE RIGHTS.

DIVISION I.

CHAPTER I.

PRINCIPLES OF THE SCOTTISH LAW OF CONVEYANCING; TENURES, ABOLISHED AND EXISTING; ALLODIAL LANDS.

Scottish system of Land Rights based on Feudal System. Principle of Feudal System as it originally existed.

THE system of Land Rights which now exists in Scotland is based on the Feudal System. The grand feature of the Feudal System, says Professor Menzies, "was, that it invested the Sovereign with the character of original and supreme proprietor of all land subject to his dominion. By him territories were allotted to his more powerful subjects, who subdivided them among their dependents, and these in their turn made subordinate grants, which descended through successive grades to an extent commensurate with the exigencies of the military following down to its lowest rank."[1] The fundamental condition of a grant by the Crown to a vassal, or by a Crown vassal to a sub-vassal, was the rendering of certain services, originally military. A grant by the Crown, or by a vassal, or by a sub-vassal, did not deprive the granter of a legal estate in the lands forming the subject of it. When the Crown made a grant of lands to a vassal it retained a radical right to the lands, which was called the *dominium directum* or superiority, and the grantee or vassal

[1] Menzies, 510.

acquired the subordinate right of property, or the *dominium utile*, of the lands. When a vassal made a grant to another of the lands acquired by him from the Crown, the granter retained the *dominium directum* or superiority of them, and the grantee acquired the right of property, or the *dominium utile*, in them, and the relationship of superior and vassal was constituted between the granter and the grantee. The right to the *dominium directum* empowered the maker of a grant of land to exact implement of the conditions of the grant; and the right to the *dominium utile* carried with it the exclusive possession and enjoyment of the lands contained in the grant, so long as the conditions of it were fulfilled by the grantee. The feudal system was introduced into Scotland in the eleventh century; but it has since been greatly modified in its operation and details by the enactments to be afterwards noticed.[1] These enactments, however, have not affected the principle of the system of land rights in Scotland, which still is, that lands, with certain exceptions, are held directly or indirectly of the Crown. "The property of land in Scotland," says Bell, "is held either directly and immediately under the Crown as paramount superior of all feudal subjects; or indirectly, either as vassal to some one who holds his land immediately from the Crown, or as a sub-vassal in a still more subordinate degree. The two separate estates of superiority and vassalage are held reciprocally either by the sovereign and his immediate vassal; or by the sovereign's immediate vassal and his vassal under him; or successively by vassals still lower, down to the last step of the ownership of land."[2] For example, the Crown may feu lands to A, who may subfeu them to B, who may subfeu them to C. In this case A, as a vassal, holds directly of the Crown; his immediate superior is the Crown. B, as a vassal, holds directly of A, indirectly of the

Feudal System modified by enactments.

Principle of present system of land rights.

Prof. G. J. Bell's statement of principle.

[1] For origin, history, and modifications of the feudal system, see Menzies, 502 *et seq.*; Bell's Lect., vol. i., 561 *et seq.*

[2] Bell's Prin., sect. 675.

Crown; his immediate superior is A, his mediate superior is the Crown. C, as a vassal, holds directly of B; indirectly first of A, then of the Crown; his immediate superior is B, his mediate superiors are first A, then the Crown. The holder of land may thus be a vassal and a superior—a vassal as regards the granter of his right, a superior as regards the grantee to whom he has subfeued. Unless effectually prohibited by a condition made prior to the commencement of the Conveyancing Act, 1874,[1] subinfeudation may go on *ad infinitum*. All conditions made after the commencement of the Act, *i.e.*, after 1st October 1874, to the effect that it shall not be lawful to the proprietor of lands to subfeu the same, to be holden of himself as immediate lawful superior thereof, are declared by section 22 of the Act null and void, and not capable of being enforced, and all enactments to the contrary of, or at variance with, the enactment in any Act of Parliament are by the same section repealed.

Holder of land may be both a vassal and a superior.

Condition against subinfeudation is valid if made prior to 1st October 1874.

While it was lawful for a vassal to grant subfeus when he was not prohibited from doing so by a condition against subinfeudation,[2] he could not, in ancient times, substitute a stranger in his place without the consent of his superior. Thus A, a vassal of B, while he might grant a feu-charter of the lands held by him to C, and thereby create an estate of superiority in them in his own favour, and give an estate of property in them to C, could not, without B's consent, convey the lands by disposition to C, so as to substitute C in his place, and thereby bring to an end the relationship of superior and vassal which subsisted between him and B. But this rule was first modified, and then abolished. By an Act of Alexander the First, the sheriff was empowered to sell a debtor's lands on fifteen days' notice when his moveables were insufficient to pay his debts, and the purchaser of the lands was entitled to hold them of the debtor's superior.[3] This Act having fallen into abeyance, it was enacted that

Superior in ancient times could refuse consent to substitution of stranger for vassal.

[1] 37 and 38 Vict., c. 94.
[2] See Ersk. 2, 5, 7.
[3] Thomson's Acts of Parliament, i., 371; Bell's Lect., vol. i., 571.

Creditors-apprisers by 1469, c. 3; adjudgers by 1672, c. 19; and purchasers of bankrupts' estate by 1681, c. 17, entitled to demand entry with superior.

creditors-apprisers,[1] adjudgers,[2] and purchasers of bankrupts' lands at judicial sales[3] should be entitled to entry with superiors on payment of a year's rent of the lands. After the passing of the Acts 1469, c. 3, and 1672, c. 19, which entitled creditors-apprisers and adjudgers to enforce entry with superiors, purchasers were often in the habit of going through the form of apprising or adjudging the seller's lands, and thereafter, as creditors-apprisers or adjudgers, demanding entry from superiors.[4] This state of the law against alienation, as opposed to subinfeudation, led also to another device by which the effect of it in practice was modified. A vassal whose desire was to substitute his disponee in his place, and not to create a permanent relationship of superior and vassal between himself and his disponee, granted two charters or conveyances to his disponee, the one with an obligation to infeft *a me*, and the other with an obligation to infeft *de me*. On these two deeds an instrument of sasine was expede, which by its terms could be held to proceed on either. In virtue of the *de me* holding, the instrument of sasine, when recorded in the appropriate Register of Sasines, gave the disponee a valid title to the *dominium utile*, with the seller as immediate superior. As soon as the superior of the vassal who had sold his lands recognised the disponee as a vassal, the infeftment was ascribed to the *a me* holding, and the deed with the holding *de me* was dropped from the progress of titles. In other words, the infeftment, until recognised by the disponer's superior, gave a valid title to the property, leaving a mid-superiority in the disponer, and, when recognised, extinguished the mid-superiority in the disponer, and invested the disponee in it. In this way was the disponee substituted in his disponer's place, and the relationship of superior and vassal between the disponer and the disponee ended. Afterwards a vassal gave to his

How disponee obtained two deeds, the one with an obligation to infeft *de me*, the other with an obligation *a me*, and afterwards one deed with an obligation *a me vel de me*, as a device evasive of law preventing alienation.

[1] 1469, c. 3.
[2] 1672, c. 19.
[3] 1681, c. 17.
[4] See Bell's Lect., vol. i., 572; Ersk. Prin., 2, 7, 3.

disponee, instead of two deeds, a disposition containing an obligation to infeft *a me de superiore meo vel de me*, or, as it came to be put, *a me vel de me*. Infeftment on such a deed secured to the disponee a feudal title to the property, and created a mid-superiority in favour of the disponer, and on the disponee's recognition by the superior the seller was divested of the mid-superiority, and the disponee invested with it. As will be shown when the disposition is under consideration, a superior recognised or entered his vassal's disponee by confirmation or resignation, and that by granting a writ by progress. The writ by progress down to the passing of the Titles to Land (Scotland) Act, 1858, was a charter of confirmation or a charter of resignation, or a combined charter of resignation and confirmation, and thereafter, till the commencement of the Conveyancing Act, 1874, a charter or writ of confirmation, or a charter or writ of resignation. The circumstances in which the charter or the writ of confirmation, and the charter or the writ of resignation, and the combined charter of resignation and confirmation were used will be pointed out in dealing with the subject of the disposition. But it may be well to notice here that although entry to a disponee of a vassal by confirmation or by resignation was common in practice prior to 1747, a disponee, as such, was not entitled to force an entry with the superior until that year, when a statute was passed which provided that any person purchasing or acquiring lands from the former proprietor or vassal who was duly vested and seised therein, and obtaining from such vendor or former proprietor a disposition or conveyance containing a procuratory of resignation, should be entitled to charge the superior in the lands to grant new infeftment to such person.[1] This statute, it will be observed, gave a purchaser with a disposition containing procuratory of resignation right to compel an entry only by resignation. But by the Lands Transference Act, 1847,[2] superiors could be compelled to

Disponee entered by confirmation or resignation.

Entry by resignation enforceable by disponee only since 1747, and entry by confirmation since 1847.

[1] 20 Geo. II., c. 50, sects. 12 and 13. [2] 10 and 11 Vict., c. 48, sect. 6.

grant entry by confirmation; for section 6 of that Act enacted that where any person should be infeft in lands or heritages in Scotland holden of a subject-superior, on a disposition containing an obligation to infeft *a me* or *a me vel de me*, and granted by the person last entered and infeft, or granted by a person whose own title was capable of being made public by confirmation according to the law and practice then existing, it should be competent to charge the superior to grant in favour of such person an entry by confirmation.

Entry by confirmation or resignation abolished since the commencement of the Conveyancing Act, 1874.

Entry by resignation or by confirmation, since the commencement of the Conveyancing Act, 1874, has been abolished. By section 4 (1) of the Act, it is provided—"It shall not, notwithstanding any provision, declaration, or condition to the contrary in any statute in force at the passing of this Act, or in any deed, instrument, or writing, whether dated before or after the passing of this Act, be necessary in order to the completion of the title of any person having a right to the lands, in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by progress; and it shall not be competent for the superior in any case to grant any such charter, precept, or other writ by progress; provided always that nothing in this Act contained shall prevent the granting of charters of *novodamus*, or precepts or writs from Chancery, or of *clare constat*, or writs of acknowledgment."

Infeftment to imply entry with the superior.

As soon as a disponee takes infeftment, he is, in accordance with the provisions of the Conveyancing Act, 1874,[1] held, as at the date of the registration of his infeftment in the appropriate Register of Sasines, to be duly entered with the nearest superior whose estate of superiority in such lands would, according to the law prior to the Act, have been not defeasible at the will of the proprietor so infeft, and that whether the superior's own title or that of any over-superior has been completed or not.

[1] See sect. 4 (2).

Feudal grants, according to the law of Scotland, have been distinguished from one another according to the different tenures or manners of holding under which the vassals enjoyed them. There have been these tenures or holdings in our system of conveyancing:— Different feudal tenures by the law of Scotland.

I. WARD.
II. SOCCAGE.
III. MORTMAIN OR MORTIFICATION.
IV. FEU.
V. BLENCH.
VI. BURGAGE.
VII. BOOKING.

Of these tenures, Ward, Soccage, and Mortmain or Mortification no longer exist. The tenures of Feu, Blench, Burgage, and Booking still exist. Ward, Soccage, and Mortmain no longer exist; the others still exist.

I. WARD.—All vassals were originally obliged, by the nature of the grant in their favour, to serve the superior in war; and the most ancient feudal tenure was that by military service.[1] This tenure was usually called ward-holding. The *reddendo* in the charters of ward lands to vassals was services used and wont, or services indefinitely. Even after feus came to be granted for payment of an annual sum, or the delivery of grain, or the performance of yearly services, the tenure was considered ward, if the charter did not express that the prestations under it were in name of feu-farm or blench-farm.[2] I. Tenure of ward, or tenure by military service. Feudal grants *in dubio* presumed to be ward.

The casualties peculiar to ward-holding were—(*a.*) *Ward;* (*b.*) *Recognition;* and (*c.*) *Marriage;* though, in common with feu and blench holdings, it involved other casualties, such as non-entry, relief, and liferent escheat. Casualties of ward-holding—(*a.*) Ward; (*b.*) Recognition; and (*c.*) Marriage.

The superior, in respect of the casualty of *ward*, was entitled to the full rents of the estate of a vassal after his death till his heir, if a male, attained majority, and if Casualty of ward.

[1] Ersk. 2, 4, 2. [2] *Ibid.*

a female, attained the age of fourteen.[1] In the case of co-heiresses, ward determined at the eldest's age of fourteen.[2] The superior's right to the lands was, however, burdened not only with the charge of upholding the houses, &c. on the feu in good condition, but also with an alimony to the heir if he had no separate means of subsistence, and with the debts of apprisers or adjudgers who were entered with the superior, or had charged him to enter them.[3] It was restricted by the terce of widows, and excluded by the courtesy of widowers.[4] But no debt contracted, or voluntary right granted by a vassal, without the authority of law or the superior's consent, restricted the casualty of ward.[5] Sometimes, in the *reddendo* of a charter, a sum was made payable yearly during the heir's minority as the valued or taxed duty of the ward, and when the ward was taxed, the minor retained possession of the lands, and the superior received payment of the yearly taxed duty.[6] In this case the casualty was called *Taxed Ward*, as opposed to single ward. A grant might be held not only by ward or taxed ward, but also by *Black Ward*. A vassal who held a fee ward of a subject-superior, and whose subject-superior also held the same fee ward of another superior, was said to hold his lands by black ward. This holding of black ward was, as Erskine states, the most rigorous holding known in our law; for the heir of a sub-vassal in lands held under it lost the rents of the lands during alike his own minority and the minority of the heir of the sub-vassal's superior.[7]

Taxed ward.

Black ward.

Recognition. When a vassal in ward lands held by simple ward or taxed ward alienated without the superior's consent more than a half of them to any person, other than the person who, if he or she survived him, must necessarily have succeeded to him though there had been no grant in his or her favour, he thereby forfeited the whole of the lands to his superior,

[1] Ersk. 2, 5, 9.
[2] *Ibid.*
[3] *Ibid.* 2, 5, 6-9.
[4] *Ibid.* 2, 5, 6.
[5] Ersk. 2, 5, 8.
[6] *Ibid.* 2, 5, 5.
[7] *Ibid.* 2, 4, 4.

and this forfeiture received the name of *Recognition*.[1] Alienations not fortified by sasine, or followed by sasine which was null;[2] legal alienations by adjudication;[3] rights of annual-rent provided the sum secured did not exceed the half of the value of the lands;[4] improper wadsets when the back tack-duty did not amount to more than half of the yearly rents;[5] rights of warrandice;[6] alienations granted by a vassal interdicted without the consent of his interdictors;[7] and alienations of teinds,[8] did not draw after them recognition. If the vassal first sold a part which was less than a half of his lands, and then sold another part, and the two parts sold were equal to more than half of the whole lands, then the two parts, with any part remaining unsold, recognosced to the superior.[9] But if the part first sold, in the case supposed, was confirmed by the superior prior to the sale of a half of the lands, the confirmation prevented it from being recognosced as well as from being taken into consideration in determining whether the parts sold, but unconfirmed, by the superior amounted to a half of the vassal's lands.[10] If, however, the confirmation of a part sold took place after the greater part of the lands had been disponed, the confirmation, whilst securing the part confirmed against recognition, did not exclude the superior from bringing it *in computo* with subsequent sales, so as to make the rest of the ward lands recognosce.[11] But a charter of *novodamus* granted by a superior to his vassal was held to imply a confirmation of all prior deeds of alienation, and to prevent them from being conjoined in a question of recognition with grants dated subsequent to such a charter.[12]

Marriage.

In virtue of the casualty of *marriage* a superior of ward lands was entitled to receive from the unmarried heir, male or female, of his vassal after the heir's age of puberty, a

[1] Ersk. 2, 5, 10-17.
[2] *Ibid.* 2, 5, 13.
[3] *Ibid.* 2, 5, 12.
[4] *Ibid.* 2, 5, 14.
[5] Ersk. Prin., 2, 5, 5.
[6] Ersk. 2, 5, 12.
[7] Ersk. 2, 5, 14.
[8] Mackenzie's Inst., 2, 5, 6.
[9] Ersk. 2, 5, 17.
[10] *Ibid.* 2, 5, 14.
[11] Ersk. Prin., 2, 5, 17.
[12] Ersk. 2, 5, 14.

certain sum as the value or avail of the tocher which the heir might reasonably have expected from marriage.[1] In the case of heirs-portioners only one casualty was due.[2] The casualty of marriage was not exigible when the heir was married prior to the death of the vassal, nor when the heir died before attaining the age of puberty.[3] The avail was either (*a.*) *Single,* (*b.*) *Double,* or (*c.*) *Taxed.* The single avail was computed at first at three years' and afterwards at two years' free rent of the vassal's lands, whether held of the superior claiming the casualty or not.[4] The express consent of the superior to the heir's marriage implied a discharge of the casualty.[5] The double avail was exigible when the heir not only refused to marry a woman offered to him by the superior, but married another without the consent of the superior.[6] The double avail was at first computed at two single avails; but Erskine states that if the value of it had been brought into dispute in later times it would have been fixed at three years' free rent of the vassal's estates.[7] In some charters the casualty of marriage was a fixed sum, and then the avail was said to be taxed.[8] Although a vassal held different lands by wards of different superiors, the casualty of marriage was due only to his eldest superior, the eldest superior being the Crown, when the vassal held any ward lands of the Crown; or when the vassal held no ward lands of the Crown, that superior from whom his ancestors in blood had obtained the first grant by the tenure of ward.[9]

Avail—(*a.*) Single; (*b.*) Double; or (*c.*) Taxed.

By 20 George II., c. 50,[10] the tenure of ward and its casualties—ward, recognition, and marriage—were abolished. The tenure of ward lands held of the Crown was converted into blench holding for payment of one penny Scots at the term of Whitsunday yearly,[11] and the tenure of ward lands

The tenure of ward with its casualties abolished by 20 George II., c. 50.

[1] Ersk. 2, 5, 18.
[2] *Ibid.* 2, 5, 19.
[3] *Ibid.*
[4] Bell's Lect., vol. i., 565.
[5] Ersk. 2, 5, 19.
[6] *Ibid.* 2, 5, 21.
[7] Ersk. 2, 5, 21.
[8] Ersk. Prin., 2, 5, 8.
[9] Ersk. 2, 5, 22; Mackenzie's Inst., 2, 5, 12.
[10] Sect. 1.
[11] Sect. 2.

held of a subject-superior was converted into feu holding for payment of a feu-duty in money, victual, cattle, or otherwise.[1] The Court of Session was authorised to prescribe by Act of Sederunt rules for determining the amount of the feu-duty to be paid to superiors,[2] and the Court, by an Act of Sederunt,[3] fixed the following rules:—When the lands were held by simple ward, one per cent. of the rent was to be paid as a yearly feu-duty on account of the casualty of marriage (unless when the vassal held lands ward of the Crown, in which case no feu-duty was payable by the vassal to a subject-superior on account of the casualty of marriage), and one per cent. as the value of the other casualties incident to ward-holdings. When the lands were held by taxed ward, two per cent. of the taxed sum was to be paid yearly as the value of all the casualties, whether the vassal held other lands ward of the Crown or not. The Act 20 George II., c. 50, provided that no proprietor should create grants of lands to be held by ward tenure.[4] It also abolished the casualty of marriage in feus *cum maritagio*,—*i.e.*, feu-holdings in which the casualty of marriage was stipulated for,—and clauses *de non alienando sine consensu superiorum*, and allowed superiors to apply to the Court of Session to modify such additional feu-duty to be paid by the vassal as the Court deemed a reasonable recompense for such casualty of marriage, or such prohibitory clauses.[5] As has already been stated,[6] persons acquiring lands from the former proprietor or vassal who was duly vested and seised therein, and obtaining a conveyance with a procuratory of resignation in their favour, could under the same statute enforce an entry with superiors.[7] Further, the Act abrogated an ancient usage by which vassals of the Crown or of a subject-superior were obliged to give suit and presence, or to appear at head courts at certain times of the year.[8]

[1] Sect. 4.
[2] Sect. 5.
[3] Feb. 8, 1749.
[4] Sect. 7.
[5] Sect. 10.
[6] See p. 5.
[7] Sect. 12.
[8] Sect. 18.

II. Tenure of Soccage.

How Soccage superseded by tenure of Feu.

II. Soccage.—When the performance of agricultural services, instead of military services, by the vassal, was stipulated for, the tenure was called *Soccage*. These agricultural services, says Professor Montgomerie Bell, "were, in course of time, exchanged for payments of corn and cattle; and finally, for the mutual convenience of superior and vassal, both services and payment in kind came, in many cases, to be commuted for a fixed rent in money,—in other words, a feu-duty. In this way arose the tenure now most commonly met with in Scotland, viz., feu-farm."[1]

III. Tenure of Mortmain or Mortification.

III. Mortmain or Mortification.—When feudal subjects are granted to churches, or other societies for religious or charitable purposes, they are said to be mortified or granted *ad manum mortuam*. The reason given for this is either that all casualties are lost to the superior when his vassal is a corporation, which in the eye of the law never dies, or that subjects mortified are held by a dead hand which cannot transfer them. Prior to the Reformation grants of land were often made to the Church, and the services prestable under them were prayers and the singing of masses for the souls of the granter and his departed friends.[2] At the Reformation mortmain or mortification was abolished as a distinctive tenure, but grants of land for religious or charitable purposes can still be held by any of the existing tenures.

IV. Tenure of Feu.

Most common *reddendo* under grants of feu.

IV. Feu.—Of the existing tenures,—feu, blench, burgage, booking,—the most common and important is *feu*. The *reddendo* in grants of lands held by the tenure of feu is now most frequently the payment of a sum annually in name of feu-duty. It was not unusual, prior to the Clan Act,[3] to stipulate in grants of land held feu for the performance of personal services by the vassals similar to those implied

[1] Bell's Lect., vol. i., 569.
[2] See Ersk. 2, 4, 10-11.
[3] Geo. I., stat. 2, c. 54; and see Geo. II., c. 43 and c. 50.

under ward-holding. These services were known as hosting and hunting, and were obligations on the vassal to attend the superior in wars and commotions, and at frays and followings.[1] But clauses stipulating for the services of hosting and hunting were abrogated by the Clan Act, and annual payments in lieu thereof were fixed either by parties, or by the Court of Session when parties themselves could not agree on a sum.[2] The Act did not make illegal the exaction of services which were not strictly personal or *quasi* military. It was held,[3] for instance, that an obligation to maintain a boat and to uphold the mansion-house for the reception of the superior was not struck at by the statute, and it was quite common after the Clan Act to stipulate that the vassal should perform services proper to a farm, as ploughing, sowing, reaping, &c.[4] Accordingly the feu-duty under a feu-charter before the commencement of the Conveyancing Act, 1874, might be payable, wholly or partly, in money, or in kind, or in services other than those abolished by the Clan Act; or, alternatively, in money, or in kind or services.[5]

Services of hosting and hunting in grants of lands held feu abolished by Clan Act.

Feu-duty in charters granted prior to 1st October 1874 might be payable in money, grain, or services.

Parties, prior to the commencement of the Conveyancing Act, 1874, could arrange for the payment of feu-duty in any way suitable to them; but in feus granted after the commencement of the Act the annual feu-duty must be of fixed amount or quantity. In such feus, however, it is competent to stipulate for a permanent increase or reduction of the feu-duty, provided that the amount thereof is certain, and that the time or times at which such increase or reduction is to have effect are also certain.[6]

In feus granted after 1st October 1874 feu-duty must be of fixed amount or quantity.

The tenure of feu-farm, or, as it is now more commonly called, the tenure of feu, was introduced to encourage the proper cultivation of the soil. Perceiving that there was a neglect of agriculture arising from the vassal's obligation to render military service under the tenure of ward, owners of

Why and when the tenure of feu was introduced.

[1] See Bell's Lect., vol. i., 373 *et seq.*
[2] Sect. 22.
[3] *Duke of Argyll* v. *Tarbert's Creditors*, Feb. 5, 1762, M. 14,495.
[4] Ersk. 2, 4, 5.
[5] Bell's Prin., sects. 693-696.
[6] 37 and 38 Vict., c. 94, sect. 23.

property, to remedy this defect, gave grants of lands on condition that the grantees should, instead of serving them in war, cultivate and sow the lands which the granters themselves kept in their own natural possession.[1] As already stated, this sort of holding was called soccage, and was superseded in practice by the tenure of feu. The tenure of feu was introduced into Scotland as early as the *Leges Burgorum*, but it had been lost sight of until it was revived and received statutory recognition by certain ancient Acts,[2] viz.—1457, c. 71, 1503, c. 91, 1690, c. 33. Some think that, instead of this tenure being a development or modification of the feudal system, it was borrowed from the Roman contract of *emphyteusis*, by which a proprietor gave to another a real right to land, generally in perpetuity, in consideration of a certain annual return in money or produce.[3]

Some think tenure borrowed from *emphyteusis*.

Further consideration of the tenure of feu and its casualties is deferred until the subject of the feu-charter comes to be dealt with.

V. Tenure of Blench.

V. Blench.—*Blench* is that tenure by which a vassal holds his lands for an elusory yearly duty to the superior, rather as an acknowledgment of than as profit to the superior. The yearly duty may be either in money, as a penny Scots, or in some other subject, as a pound of wax or pepper. The *reddendo* in a blench charter may stipulate simply for payment or fulfilment of the duty, or it may stipulate for payment or fulfilment of the duty *si petatur* or *si petatur tantum*. If the *reddendo* stipulates simply for payment or fulfilment of the duty, the duty, if it is a thing of yearly growth, cannot be exacted unless it is demanded within a year after it becomes payable by the *reddendo*, but the duty, if it is not the subject of yearly growth, can be exacted at any time within the years of prescription. If, on the other

[1] Ersk. 2, 4, 5.
[2] *Ibid.*
[3] On resemblance of tenure of feu to *emphyteusis*, see Ersk. 2, 4, 6.

hand, the *reddendo* stipulates for payment or fulfilment of the duty *si petatur* or *si petatur tantum*, the vassal is relieved from the annual duty stipulated, whether it is a thing of yearly growth or not, if it is not demanded within the year. As by section 3 of the Conveyancing Act, 1874, the word "feu" includes "blench," and the word "feu-duty" includes "blench-duty,"[1] the annual blench-duty in grants made after the commencement of the Act of land to be held by the tenure of blench must, by section 23, be of fixed amount or quantity, but it is competent to condition or stipulate for a permanent increase or reduction of the blench-duty if the amount thereof is certain, and if the time or times at which such increase or reduction is to have effect are also certain. As will be shown afterwards, the casualties incident to the tenure of blench are the same as those incident to the tenure of feu.

Duff says that this tenure arose when the feudal manners began to give place to a certain degree of industry and civilisation,[2] and grants to be held by the tenure of blench were often formerly granted because the granter desired to confer on the grantee a free gift for distinguished services,—*ob præclara in rempublicam merita et partem bello gloriam*, or because the granter had paid a capital sum to him in lieu of future annual prestations. For these reasons the use of a blench-charter may still be resorted to; but that charter has almost fallen into desuetude, for now a feu-charter stipulating for an elusory feu-duty is invariably used, where formerly a blench-charter would have been granted.[3] The *tenendas* in a blench-charter formerly bore to be *in libera alba firma*; the *tenendas* in the blench-charter in its modern form bears to be in blench-farm. In a case of doubt the tenure of blench was not presumed. Even although the *reddendo* in a charter bears that the duty under it is payable *si petatur* or *si petatur tantum*, the tenure, according to Stair, is not to be accounted

[1] 37 and 38 Vict., c. 94, sects. 3 and 23.

[2] Duff's Feudal Conveyancing, p. 49.

[3] Jur. Styles, vol. i., 34.

blench if it is not also expressed to be payable *nomine albæ firmæ*,—in name of blench-farm.[1]

VI. Tenure of Burgage.

VI. BURGAGE.—The tenure of burgage is that by which Royal Burghs hold of the Sovereign the houses and lands that lie within the limits of their several charters of erection.[2] The Sovereign may be regarded as superior of each proprietor, or, as some think, of the burgh composed of individual burgesses,[3] and the service expressed in the charters of Royal Burghs is watching and warding. There are not, and never were, any casualties due under this tenure. When, prior to the Conveyancing Act, 1874, the Magistrates granted entry, they acted as the Sovereign's bailies, specially authorised by the Act 1597, c. 27. Whilst, before 1874, Magistrates of a Royal Burgh could feu portions of the lands within the burgh, it was a subject of dispute whether private proprietors of burgage lands could grant feus thereof.[4] This matter has been set at rest by section 25 of the Conveyancing Act, 1874. The section is in the following terms:—

> "The proprietors of and all others having any estate in land held burgage shall have the same right and interest in such estate as would have belonged to them under this Act or otherwise had the tenure been feu instead of burgage, and there shall not after the commencement of this Act be any distinction between estates in land held burgage and estates in land held feu, in so far as regards the conveyances relating thereto, or the completion of titles, or any of the matters or things to which the provisions of this Act relate; and the proprietors of estates in land which were held burgage shall be entitled to grant feus of the same in the same manner and to the like effect as if such estates in land had been held by feudal tenure; and the titles of all such feus granted before the commencement of this Act shall be unchallengeable on the grounds that such feus are of land held by burgage tenure, or that such titles have been recorded in the burgh register of sasines. Writs affecting land which immediately prior to the commencement of this Act was held burgage shall be recorded in the burgh register of sasines. The provisions of this section in regard to land held by ordinary burgage tenure shall be applicable also to lands in the burgh of Paisley held by

[1] Stair, 2, 3, 33; see also Ersk. 2, 4, 7; Duff's Feudal Conveyancing, p. 34.

[2] Ersk. 2, 4, 8.

[3] Bell's Lect., vol. ii., 787.

[4] See *Dawson and Mitchell* v. *Magistrates of Glasgow*, 1827, 6 S., 19, 4 W. and S., 81; *Magistrates of Arbroath* v. *Dickson*, 1872, 10 Macph., 630.

the peculiar tenure of booking, except that writs affecting land in said burgh held by the tenure of booking shall be recorded in the register of booking therein."

VII. Booking.—This tenure is peculiar to the burgh of Paisley. Formerly conveyances of land held by this tenure, in place of an obligation to infeft, contained an obligation "to book and secure." Prior to the Titles Acts of 1860[1] and 1868,[2] such conveyances were followed by minutes of booking, of which extracts were given out by the town-clerk, who keeps the Register of Booking. After these Acts, they could be recorded with warrant of registration in the Register of Booking. Now conveyances of land held by the tenure of booking may be in the same form as those of lands held in feu; but all writs relating to lands in Paisley, held prior to the Conveyancing Act, 1874, by the tenure of booking, must still be recorded in the Register of Booking.[3]

VII. Tenure of Booking peculiar to Paisley.

Allodial Lands.—By the expression "allodial property" is meant property which is held of no superior. Under allodial property fall to be included :—

Allodial lands.

(1.) *Crown Property.*—This includes the superiority of the lands belonging to subjects in property; the rights reserved to the Crown out of lands feued to subjects, *e.g.*, mines of gold, salmon fishings, &c.; the Sovereign's lands, castles, strongholds, and palaces.[4]

(1.) Crown property.

(2.) *Principality of Scotland.*—This consists of lands belonging to the Sovereign's eldest son, as Prince and Steward of Scotland, and to the Sovereign when there is no Prince.[5]

(2.) Principality of Scotland.

(3.) *Church Property.*—Churches, churchyards, manses, and glebes to which a perfect title is created by the designation of the presbytery.[6]

(3.) Church property.

[1] See sect. 23 of 23 and 24 Vict., c. 143.
[2] See sect. 152 of 31 and 32 Vict., c. 101.
[3] 37 and 38 Vict., c. 94, sect. 25.
[4] Menzies, 516; Bell's Prin., sect. 668 *et seq.*
[5] Bell's Prin., sect. 674.
[6] Menzies, 516; see Duncan's Parochial Ecclesiastical Law, p. 386.

(4.) Udal property.

(4.) *Udal Property.*—This comprehends those lands within the islands of Orkney and Shetland which have not been feudalised by the proprietors of them obtaining a charter from the Crown. Once feudalised by charter and sasine from the Crown, lands in Orkney and Shetland are subject to the ordinary feudal principles, with the exception of church lands not exceeding £20 Scots of valued rent, which, under 1690, c. 32, are appointed to be held by the udal right.[1]

(5.) Certain parts of lands taken under the Lands Clauses Consolidation (Scotland) Act, 1845.

(5.) *Lands acquired by railway or other companies under the compulsory powers conferred by the Lands Clauses Consolidation (Scotland) Act,* 1845,[2] *being parts of other lands held by the same owner under the same titles.* Section 126 of that Act provides that, in the event of the lands which are used or taken by a company under the compulsory powers conferred by the Act "being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors; provided always that, before entering into possession of any lands, full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties, or otherwise by reason of any procedure under this Act."[3] When a title is completed by a railway company under section 80 of the Act, no feudal relation is established between the company and the superior.[4]

[1] See Menzies, 517, and authorities there cited; Bell's Prin., sect. 932-933.

[2] 8 and 9 Vict., c. 19, sects. 80, 126.

[3] See *Magistrates of Elgin* v. *Highland Railway Co.*, 1884, 11 R., 950.

[4] Per Lord President Inglis in *Magistrates of Elgin, supra.*

CHAPTER II.

FEU-CHARTER; BLENCH-CHARTER; FEU-DISPOSITION; FEU-CONTRACT.

FEU-CHARTER.

A NEW legal fee is, at the present time, most commonly created by the granting of a feu-charter on the part of a proprietor of land, whose title has been duly completed thereto, to his grantee, and by infeftment on the charter. The infeftment is now taken either by recording the charter, with a warrant of registration in favour of the grantee, in the division of the General Register of Sasines applicable to the lands contained in it, or by expeding and recording, with a warrant of registration, a notarial instrument in such division of the General Register of Sasines. The charter and the infeftment constitute the relationship of superior and vassal between the granter and the grantee. But before dealing with the feu-charter in its modern form, and with the mode of infeftment now in use, it is necessary to show how the feudal relationship of superior and vassal was formerly constituted. It will therefore be convenient to show how that relationship was constituted—(1.) In ancient times and prior to the Infeftment Act, 1845;[1] (2.) after the commencement of the Infeftment Act, 1845, till the commencement of the Lands Transference Act, 1847;[2] (3.) after the commencement of the Lands Transference Act, 1847, till the commencement of the Titles to Land (Scotland) Act, 1858;[3] (4.) after the com-

How legal fee now constituted.

How legal fee formerly constituted.

[1] 8 and 9 Vict., c. 35.
[2] 10 and 11 Vict., c. 48.
[3] 21 and 22 Vict., c. 76.

mencement of the Titles to Land (Scotland) Act, 1858, till the commencement of the Titles to Land Consolidation (Scotland) Act, 1868;[1] and thereafter to deal (5.) with the feu-charter and infeftment in their present form.

(1.) *Charter and Infeftment prior to the Infeftment Act*, 1845.

Proper investiture.

To the constitution of the relation of superior and vassal no writing was by our earliest customs required. At first a proprietor himself, on the lands and in the presence of his vassals (called *pares curiæ*), or at least two of them, delivered a portion of the lands as for the whole to his grantee, and the grantee took the oath of fidelity. On this being done the granter and the grantee became respectively superior and vassal. When the granter had no vassals, two or more strangers were called to witness the ceremony of giving possession to the grantee. In the course of time the granter, after possession had been given to the grantee, gave a declaration of the grant in writing, which was called *breve testatum*, and to which the granter and the witnesses appended their seals. Instead of a *breve testatum* sealed by the granter and witnesses, a certificate of a notary public, or of two witnesses from among the granter's vassals, was sometimes given as an attestation of the delivery of possession to the grantee. The form of constituting the feudal relationship above described was called the *proper investiture*, because possession was given by the granter *in propria persona*. The *breve testatum* is the foundation of the charter.

Breve testatum.

Improper investiture.

As it was often inconvenient for the granter to attend personally on the lands, the practice was introduced of executing the *breve testatum* prior to delivery of possession, and directing it to the granter's commissioner or bailie as a warrant to give possession to the grantee. The commissioner or bailie, after giving delivery of the lands to the grantee,

[1] 31 and 32 Vict., c. 101.

either sealed the *breve testatum* in attestation of the delivery, or wrote out and sealed a separate declaration of the fact. On account of delivery having been given, not by the granter *in propria persona,* but by his commissioner or bailie, this form of creating the feudal relationship was called *improper investiture.* The declaration given by the bailie in improper investiture is the foundation of the instrument of sasine.[1]

Charter with separate precept and then charter containing precept.

Both proper investiture and improper investiture, as described, were superseded by the introduction, after the beginning of the fifteenth century, of a practice of granting on the part of the proprietor to his grantee a formal charter. At first a separate precept accompanied the charter; and the precept continued for fully two centuries to be granted in a writ separate from the charter. But by 1672, c. 7, it was enacted that all precepts on charters granted by the Crown should be engrossed in the charters towards the end of them; and this provision soon gave rise to the custom of making precepts of sasine part of charters which were granted by subject-superiors. After stating the way in which the precept of sasine became part of the charter, Erskine adds—"Now, therefore, all charters, without exception, conclude with a precept of seisin, which may be defined a command by the superior, who grants the charter to his bailie, to give seisin or possession of the subject disponed to the vassal or his attorney by the delivery of the proper symbols."[2]

How feudal relationship constituted prior to the Infeftment Act, 1845.

The steps necessary for constituting the feudal relationship for many years prior to the commencement of the Infeftment Act, 1845, were (*a.*) the granting of the charter; (*b.*) symbolical delivery by the appropriate symbols on the ground of the lands disponed by the charter; and (*c.*) expeding by a notary, and recording within sixty days of its date, an

[1] On proper and improper investiture, see Ersk. 2, 3, 17; Menzies, 528-9; Bell's Lect., vol. i., 576-7.

[2] Ersk. 2, 3, 33.

instrument of sasine in favour of the grantee either in the General Register of Sasines, or in the Particular Register of Sasines appropriate to the lands. It is necessary here to note the clauses of the charter in the form in use prior to the Infeftment Act, 1845; the details of the ceremony of symbolical delivery; the clauses of the instrument of sasine; and the registration of the instrument.

Charter prior to the Infeftment Act, 1845.

The charter in the form used prior to the Infeftment Act contained these parts:—

(1.) Narrative clause, containing the names and designations of the granter and the grantee, and the cause of granting.

(2.) Dispositive clause, containing the words of conveyance, the destination to heirs, the description of the subjects, the reservations, conditions, provisions, burdens, and limitations of the grant.

(3.) Clause of *tenendas*, expressing the holding.

(4.) Clause of *reddendo*, setting forth the feu-duty and other prestations.

(5.) Clause of warrandice.

(6.) Assignation to writs and rents.

(7.) Clause of warrandice of that assignation.

(8.) Obligation to free the subjects of public burdens.

(9.) Clause of registration for preservation.

(10.) Precept of sasine.

(11.) Testing clause.[1]

Terms of precept.

The precept of sasine in a charter, *e.g.*, disponing lands, with the teinds thereof, was in these terms:—

> "Moreover, I hereby desire and require you and each of you, my bailies in that part hereby specially constituted, that on sight hereof ye pass to the ground of the said lands and others, and there give and deliver to the said B or his foresaids, heritable state and sasine, real, actual, and corporal possession of All and Whole the lands, teinds, and others particularly above specified, with the parts and pertinents thereto belonging, lying and described as aforesaid, and here held as repeated *brevitatis causa*, to be holden in manner foresaid,

[1] For form, see Jur. Styles (4th edition), vol. i., 16.

and for payment of the feu-duties before specified, and that by deliverance to the said B or his foresaids, or to his or their attorney, in his or their names, bearers hereof, of earth and stone of the ground of said lands, and an handful of grass and corn for the said teinds, with all other symbols usual and necessary ; and this in noways ye leave undone."

Precept executive clause of charter.

The precept of sasine was the executive clause of the charter. It required to contain a mandate to give delivery or sasine to the disponee, who required to be identified.[1]

After 1693, c. 35, precept of sasine (and procuratories of resignation) could be used after as well as before death of granter and grantee thereof, an heir, assignee, or adjudger requiring to deduce his title.

It was not essential that the precept should specify the symbols of delivery, although it usually did so.[2] Like procuratories of resignation, precepts of sasine could not, prior to 1693, c. 35, be used after the death of the granters or grantees of them. But that Act declared "that procuratories of resignation and precepts of sasine, either already granted or to be granted, shall in all time comeing continue in full force and be sufficient warrants, not only for makeing of resignations and takeing sasines in favours of the parties to whom they are or shall be granted, but likewise in favours of their heirs, assigneys, and successors having right to the said procuratories and precepts, either by a generall service, or by disposition and assignation, or by adjudication, as well after as before the death of the granters or parties to whom they are granted, or both, provideing always that the instruments of registration and sasines taken after the death of either party express the titles of those in whose favours the resignation is made or to whom the sasine is granted, and that the same be deduced therein, otherwise to be void and null."

Ceremony of symbolical delivery.

The clauses of the charter in use prior to the Infeftment Act, 1845, having been mentioned, and the object of the precept of sasine having been shown, the ceremony of giving delivery or sasine by certain symbols falls next to be considered. At the ceremony of symbolical delivery five persons appeared :—(1.) an attorney on behalf of the disponee ; (2.) the

[1] Bell's Prin., sect. 876 ; and see *Blackwood* v. *Earl of Sutherland*, 1740, M. 14,327.

[2] *Barstow* v. *Stewart*, 1858, 20 D., 612.

Disponee's attorney; disponer's bailie; notary public; and two witnesses present.

disponer's bailie; (3.) a notary public; and (4 and 5.) two witnesses. The disponee's attorney produced the charter containing the precept of sasine, delivered it to the bailie, and requested him to deliver sasine of the lands. The bailie then handed the deed to the notary public to be read and published. The notary public, having done so, returned the deed to the bailie. The bailie thereupon delivered the symbols appropriate to the grant to the attorney; and the attorney, putting a piece of money into the notary's hands, declared that he took instruments, and called the attention of the witnesses to the fact that he had done so. The whole ceremony was performed on the ground of the lands of which delivery was given.[1]

Instrument of sasine before Infeftment Act, 1845.

After the ceremony of symbolical delivery the notary public expede an instrument of sasine in favour of the person in whose favour the delivery had been made. The instrument consisted of the following parts:[2]—

Clauses of instrument:—(1.) Invocation. (2.) Day, month, and year of our Lord and reign of the Sovereign.

(1.) *Invocation to the Deity.*

(2.) *Clause setting forth day, month, and year of our Lord and of the reign of the Sovereign when symbolical delivery given.* Although it seems never to have been authoritatively settled that both dates were essential, it was held that when both were given they had to correspond.[3]

(3.) Appearance, in presence of notary public and witnesses, of bailie and attorney.

(3.) *Clause setting forth the appearance (in presence of notary public and of the witnesses) of disponer's bailie and disponee's attorney on the ground of the lands.* It was essential that the instrument should bear that the ceremony took place on the ground of the lands disponed. When the charter or other

[1] Menzies, 570; Bell's Lect., vol. i., 650-1.

[2] For Form, see Jur. Styles (4th edition), vol. i., 59.

[3] *Town-Council of Brechin* v. *Arbuthnot*, 1840, 3 D., 216; *Lindsay* v. *Giles*, 1844, 6 D., 771; *Haig* v. *Haig*, 1857, 19 D., 449; and see Lord Curriehill in *M'Farlan*, Petitioner, 1853, 15 D., 708.

deed of conveyance contained different lands, which were either locally or legally discontiguous, symbolical delivery had to take place on each of the different lands, and the instrument set forth the appearance of the notary public, the witnesses, the attorney, and the bailie on the ground of the lands described in the instrument respectively and successively. Lands were legally discontiguous when they were held (*a.*) by different tenures; (*b.*) by different titles; or (*c.*) of different superiors.[1] Separate acts of symbolical delivery were also necessary when the deed contained, in addition to lands, other subjects for which earth and stone were not the appropriate symbols.[2] When, however, lands either locally or legally discontiguous, or lands with teinds, fishings, &c., had been erected into a barony, delivery could be made by the symbols of earth and stone for the lands and other subjects at the place appointed by the charter of barony, or, if no place was so appointed, then on any part of the lands. Further, the Crown could, by a clause of union in a charter, unite subjects lying locally discontiguous, or requiring different symbols for delivery; and if in the clause of union a place for delivery was appointed, delivery had to take place there, but if no such place was appointed, delivery could be given on any part of the united lands.[3] If part of the lands included in a charter containing a clause of union, or part of the lands of a barony was sold, both the part retained and the part disponed under a feu-charter or a disposition had the benefit conferred by the union.[4] A clause of union granted by a subject-superior was ineffectual unless confirmed by

When lands locally or legally discontiguous, symbolical delivery necessary on such.

When lands legally discontiguous.

[1] Bell's Prin., sect. 874.
[2] Bell's Lect., vol. i., 660.
[3] Bell's Prin., sect. 874.
[4] *Montgomerie* v. *Cathcart*, March 2, 1813, F. C.; *Blairquhen* v. *Tenants*, 1637, M. 16,401; *Heron* v. *Syme*, 1771, M. 8684, No. 109.

the Crown.[1] When lands were neither erected into a barony nor united by a clause of union, the symbols for teinds were delivered on the ground of the lands,—those for fishings at the fishing station; those for rights of patronage within the parish church; and those for mills within the mills.

(4.) Production of charter, &c.

(4.) *Clause setting forth production of charter by attorney, the names of disponer and of disponee, and the subjects disponed.*

(5.) Exhibition of charter, &c.

(5.) *Clause setting forth exhibition of charter by attorney to bailie, and request by attorney to bailie to execute the office of bailiary.*

(6.) Delivery, reading, &c. of charter.

(6.) *Clause setting forth delivery by bailie to notary public of charter to be read and published to the witnesses, and fact of reading and publishing.*

(7.) Precept of sasine and testing clause of charter.

(7.) *Clause setting forth* ad longum *precept of sasine and testing clause of charter.*

(8.) Sasine.

(8.) *Clause setting forth delivery by bailie to disponee of heritable state and sasine, real, actual, and corporal possession of the lands disponed, and that by delivery to his attorney of earth and stone on the grounds of the lands.* An instrument of sasine was held invalid, which, although it set forth the delivery of the appropriate symbols, omitted to bear that heritable state and sasine, real, actual, and corporal possession, had been delivered.[2] Professor Montgomerie Bell states that it was indispensable that the particular symbols used should be set forth in the instrument.[3] In the case of *Urquhart*,[4] however, an instrument which bore that the usual symbols were delivered was held valid. Professor George Joseph Bell remarks that the judgment in

[1] *Aitken* v. *L. Grinislaw*, 1623, M. 16,397; *Borthwick* v. *Ker*, 1836, M. 16,401.

[2] *Davidson* v. *M'Leod*, 1827, 6 S., 8.

[3] Bell's Lect., vol. i., 655.

[4] *Urquhart* v. *Officers of State*, 1753, M. 9921; aff. 1755, 1 Cr. and St., 586.

Urquhart is not to be relied on absolutely.[1] The specification of a wrong symbol was fatal to an instrument; and where an instrument of sasine set forth, in the delivery of the lands, the symbol of stone, instead of earth and stone, it was held null.[2] The appropriate symbols were—for land and its accessories, earth and stone; for salmon fishings, net and coble; for a mill, when a separate tenement, clap and happer; for teinds, a handful of grass and corn; for annual rent of money, one penny money; for annual rent of victual, a parcel of corn or victual; for rights of ferry, an oar and some water; for the right of patronage of a parish church, a psalm-book and the keys of the church; and for houses held burgage when sasine was in favour of an heir, hasp and staple, and sometimes earth and stone as well as hasp and staple.

(9.) *Clause setting forth the taking of instruments by attorney in the hands of notary public.* (9.) Taking of instrument.

(10.) *Clause setting forth that ceremony performed between specified hours of the day when sasine given in the presence of the witnesses.* (10.) When ceremony took place.

(11.) *Notarial docquet in Latin, setting forth the notary's name and diocese, his appointment, his presence at ceremony, his seeing, knowing, and hearing the facts narrated in the instrument.* Whilst the body of the instrument could be written by any one, this docquet had to be holograph of the notary public. The omission from the docquet of the statement that the notary was present with the witnesses at the transactions set forth in the instrument was a fatal objection.[3] An immaterial omission from or a grammatical or a clerical error in the docquet did not invalidate (11.) Notarial docquet.

[1] Bell's Prin., sect. 871.

[2] *Town-Council of Brechin* v. *Arbuthnot*, 1840, 3 D., 216.

[3] See *Primrose* v. *Dury*, 1612, M. 14,326; *Macintosh* v. *Inglis and Weir*, 1825, 4 S., 190.

the instrument.[1] The instrument of sasine required to be signed by one notary[2] and two witnesses.[3] When the deed consisted of more than one sheet, the pages had to be numbered, and the notarial docquet had to set forth the number of pages of which the deed consisted,[4] and each leaf had to be signed by the notary and the witnesses.[5] The reason for the signing of each leaf by the witnesses was that they were witnesses to the facts narrated in the instrument,—not simply to the subscription of the notary. When the instrument was written on one sheet, it was unnecessary to number the pages or to mention their number in the docquet, and subscription by the notary and the witnesses at the close of the deed was sufficient.[6] The witnesses' designations had to be inserted in all cases in the instrument of sasine.[7]

Instrument of sasine required to be recorded within sixty days of its date.

After the granting of a feu-charter, symbolical delivery, and the expeding of an instrument of sasine, it was necessary, for the completion of a feudal title in the person of the disponee, to secure the registration of the instrument within sixty days of its date[8] in the General Register of Sasines at Edinburgh, or in the Particular Register of Sasines of the district within which the lands lay.[8] When the lands lay in different districts, the instrument could be recorded in the General Register of Sasines, or in the particular register of every district in which the lands were situated.[8] The rule for computing the time within which an instrument of sasine could be recorded was by days, counting from midnight to midnight, and excluding the day on which the act of delivery was done as the *terminus a quo*.[9]

Computation of sixty days.

[1] See *M'Ghie* v. *Leishman*. 1827, 5 S., 758; *Dickson* v. *Cuninghame*, 1827, 7 S., 503.
[2] 1584, c. 4.
[3] *Bishop of Aberdeen* v. *Viscount Kenmure*, July 15, 1680, M. 3011.
[4] Act of Sederunt, January 17, 1756.
[5] 1686, c. 17; see *Carnegie* v. *Scott*, 1796, M. 8858.
[6] See Bell's Lect., vol. i., 658.
[7] 1681, c. 5.
[8] 1617, c. 16.
[9] *Lindsay* v. *Giles*, 1844, 6 D., 771.

(2.) *Charter and Infeftment after the Infeftment Act*, 1845, *till the Lands Transference Act*, 1847.

Infeftment Act, 1845, introduced new form of precept of sasine.

The only alteration made by the Infeftment Act, 1845, on the form of the feu-charter formerly in use was in the precept of sasine. The Act enacted[1] that in all deeds containing a precept of sasine, such precept might be in the form and as nearly as might be in the terms of schedule (A) which is as follows:—

Form of precept of sasine.

> "Moreover I desire any notary public to whom these presents may be presented, to give to the said A. B., or his foresaids, sasine [*or* liferent sasine, *or* sasine in liferent and fee respectively, *as the case may be*] of the lands and others above disponed [*if the deed be granted under the burden of a real lien or servitude, or any other incumbrance, condition, or qualification of the right, or under redemption, then there will be added here*, 'but always under the real burden of the real lien,' *&c.*, (*as the case may be*) before specified]. In witness whereof, *&c.* [*here insert a testing clause in legal form*]."

Infeftment Act, 1845, made unnecessary symbolical delivery, and made it competent to take infeftment by having expede instrument of sasine in new form.

In addition to supplying a new form of precept of sasine, the Act enacted—(1.) that from and after 1st October 1845 it should not be necessary to proceed to the lands in which sasine was to be given, or to perform any act of infeftment thereon, but that sasine should be effectually given therein and infeftment obtained by producing to a notary public the warrants of sasine and relative writs, as then in use, to be produced at taking infeftment, and by expeding and recording in the General Register of Sasines, or the Particular Register of Sasines applicable to the lands[2] contained in the warrant of infeftment, an instrument of sasine setting forth that sasine had been given on the lands, and subscribed by the notary public and witnesses, according to the form and as nearly as might be in the terms of schedule (B) annexed to the Act:[3] (2.) that such form of infeftment should be effectual whether the lands lay contiguous or discontiguous, or were held by the same or by different titles, or of one or more superiors, or whether the deed entitling the party to obtain infeftment

Such form of infeftment competent whether lands contiguous or discontiguous, &c.

[1] Sect. 5.

[2] The word "lands" in the Act includes houses, fishings, mills, minerals, pasturages, teinds, and in general all heritable subjects or rights in which infeftment may be taken.—See sect. 10.

[3] Sect. 1.

was dated prior or subsequent to the Act, or whether the precept of sasine therein was in the form theretofore in use, or in the form authorised by the Act:[1] (3.) that such instrument of sasine, on being recorded in the manner theretofore in use with regard to instruments of sasine, should in all respects have the same effect as if sasine had been taken, and an instrument of sasine duly recorded according to the law and practice theretofore in use:[2] (4.) that every such instrument of sasine might be competently and effectually recorded at any time during the life of the party in whose favour such instrument had been expede, but that the date of presentment and entry set forth on any such instrument by the keeper of the record should be taken to be the date of the instrument of sasine and infeftment:[3] (5.) that in case of any error or defect in any such instrument of sasine it should be competent of new to make and record an instrument of sasine, which should have effect from the date of the recording thereof, as if no previous instrument or instruments had been made or recorded;[4] and (6.) that the instrument of sasine on any deed containing a precept in the form given in the Act should be in the form and as nearly as might be in the terms of schedule (B).[5]

Instrument of sasine in new form when recorded to have same effect as formerly.

Instruments of sasine in new form might be recorded at any time during the life of party.

In case of error or defect, another instrument might be recorded.

Instrument of sasine to be in form given in Act when precept of sasine according to the Act.

Parts of instrument of sasine under the Act.

The form of instrument of sasine introduced by the Act consisted of five parts:—

(1.) Introductory clause.

(1.) *The introductory clause, containing the notary's declaration that, at a certain place, the charter or other warrant of infeftment and relative writs were produced to him.*

(2.) Narrative of warrant, &c.

(2.) *Narrative of the warrant and midcouples, the engrossment verbatim of the precept of sasine (in old or new form), and of the testing clause.*

(3.) Clause of delivery of sasine.

(3.) *Clause of delivery of sasine under any real burdens, &c.*

(4.) Testing clause.

(4.) *Testing clause.*

[1] Sect. 1.
[2] Sect. 2.
[3] Sect. 3.
[4] Sect. 4.
[5] Sect. 5.

The testing clause contained no date, the date of presentment and entry set forth on the instrument by the keeper of the record being held to be, under the Act, the date of the instrument and infeftment. The notary public signed each page, but the witnesses, being no longer witnesses to the giving of sasine, but simply witnesses to the notary's subscription, only required to sign the last page.

How after Infeftment Act, 1845, a person in right of a charter or other sufficient warrant of infeftment containing precept of sasine, in old or new form, could take infeftment.

From the provisions of the Infeftment Act, 1845, it will be seen that, subsequent to the commencement of the Act, a person, in right of a charter or other sufficient warrant of infeftment containing a precept of sasine in the form in use prior to the Act, could take infeftment, after symbolical delivery, by having expede and recorded, within sixty days of its date, in the General Register of Sasines, or in the appropriate Particular Register of Sasines, an instrument of sasine in the form in use prior to the Act; or, without symbolical delivery, by having expede and recorded in the General Register of Sasines, or in the appropriate Particular Register of Sasines, at any time during his life, an instrument of sasine in the form of schedule (B) of the Act; whereas a person in right of a charter or other sufficient warrant of infeftment, containing a precept of sasine in the form introduced by the Act, could only take infeftment in the latter of these two methods. Section 3, it is thought, did not authorise registration of an instrument of sasine in the old form after sixty days of its date, but confined the privilege of registration of an instrument of sasine at any time within the life of the party in whose favour it was expede to instruments of sasine in the form prescribed by the Act.[1] The words of section 5 also seem to have excluded the competency of expeding an instrument of sasine in the old form on a charter containing a precept in the form given in the Act.

[1] See Menzies, 591.

(3.) *Charter and Infeftment after the Lands Transference Act, 1847, till the Titles to Land (Scotland) Act, 1858.*

Lands Transference Act, 1847, introduced short forms of various clauses.

The Lands Transference Act, 1847,[1] which took effect from and after 30th September 1847,[2] made it lawful, but not imperative, to insert in dispositions and conveyances, and other deeds and instruments necessary for the transmission of lands and other heritages not held burgage, short statutory forms of various clauses, instead of the longer forms then in use.[3] The clauses in the form of charter used prior to the Lands Transference Act, 1847, and the clauses in the form of the charter which came into use after the Act, may be shown in parallel columns :—

Clauses of Charter prior to Lands Transference Act, 1847.	*Clauses of Charter after Lands Transference Act till Titles to Land (Scotland) Act, 1858.*
1. Narrative clause.	1. Narrative clause.
2. Dispositive clause.	2. Dispositive clause.
3. Clause of *tenendas.*	3. Term of entry.
4. Clause of *reddendo.*	4. Clause of *tenendas.*
5. Clause of warrandice of the lands, either absolute or from fact and deed only.	5. Clause of *reddendo.*
6. Assignation to writs and rents from certain time.	6. Clause of assignation of the writs and title-deeds.
7. Clause of warrandice of said assignation.	7. Clause of assignation to the rents.
8. Obligation to free the subjects of public burdens.	8. Obligation to free the subjects of public burdens.
9. Clause of registration.	9. Clause of warrandice.
10. Precept of sasine.	10. Clause of registration.
11. Testing clause.	11. Precept of sasine.
	12. Testing clause.

Act did not affect infeftment.

The Lands Transference Act, 1847, made no change as regards infeftment.

[1] 10 and 11 Vict., c. 48.
[2] Sect. 23.
[3] See sects. 1, 2, 3, and Schedule (A).

(4.) *Charter and Infeftment after the Titles to Land (Scotland) Act,* 1858, *till the commencement of the Titles to Land Consolidation (Scotland) Act,* 1868.

Provisions of Titles to Land Act, 1858.

The Titles to Land (Scotland) Act, 1858,[1] whilst providing that nothing contained in it should prevent the constitution, transmission, or completion of land rights by the form in use prior to the passing of the Act, contained certain important provisions both as to the form of deeds of conveyance and infeftment thereunder. The provisions, so far as relevant to the present chapter, may be mentioned in the order in which they are set forth in the Act. The Act enacted—(1.) that from and after the 1st October 1858 it should not be necessary to expede and record an instrument of sasine on any conveyance of lands, but that it should be competent and sufficient for the person or persons in whose favour the conveyance was granted, instead of recording such instrument of sasine, to record the conveyance itself, with a warrant of registration thereon in his or their favour, in the Register of Sasines applicable to the lands therein contained;[2] (2.) that where a conveyance of lands was contained in a deed granted for further purposes and objects, or where a deed conveyed separate lands, or separate interests in the same lands, to the same or different persons, it should not be necessary to record the whole of such deeds, but that it should be competent and sufficient to expede and record in the appropriate Register of Sasines a notarial instrument;[3] (3.) that immediately before the testing clause of any conveyance it should be competent to insert a clause of direction in or as nearly as might be in the form of schedule (C) in the Act, specifying the part or parts of the conveyance which the granter desired to be recorded in the Register of Sasines; and

(1.) Competent to record conveyance with warrant.

(2.) Recording of notarial instrument in certain cases.

(3.) Clause of direction.

[1] 21 and 22 Vict., c. 76.

[2] Sect. 1 and schedule (A) for form of warrant.

[3] Sect. 2 and schedule (B) for form of notarial instrument.

that where such clause was inserted the keeper of the register should record such part or parts only, together with the clause of direction and the testing clause, and the warrant of registration as before provided, and that the recording of such part or parts of the conveyance, together with the clause of direction and the testing clause and the warrant of registration, should have the same legal effect as if a notarial instrument containing such part or parts of the conveyance had been duly expede and recorded in favour of the party on whose behalf the conveyance was presented.[1] Notwithstanding a clause of direction, it was competent by the Act to record, with warrant of registration, the whole deed; and if the deed containing such a clause of direction was granted for further purposes and objects than the conveyance of land, or conveyed separate lands or separate interests in the same lands, a notarial instrument could be expede and recorded, but it was declared that no part or parts of the conveyance directed to be recorded should be omitted from the notarial instrument.[2] The Act also provided—(4.) that it should not be necessary to insert in any conveyance a precept of sasine;[3] (5.) that where a party should have granted or should grant a general conveyance of his lands, whether by deed *mortis causa* or *inter vivos*, it should be competent to the disponee under such conveyance, or to any other party who should have acquired right to such conveyance, in whole or part, by service, assignation, adjudication, or otherwise, to complete his title by expeding and recording a notarial instrument in or as nearly as might be in the form of schedule (H);[4] (6.) that where lands had been particularly described in any prior conveyance or other writ, duly recorded in the appropriate Register of Sasines, it should not be necessary in any subsequent conveyance or writ containing or referring to the whole or any part of such lands, to repeat the particular description

(4.) Precept of sasine unnecessary.

(5.) Notarial instrument in favour of general disponees.

(6.) Description by reference in statutory form.

[1] 21 and 22 Vict., c. 76, sect. 3.
[2] Sect. 3.
[3] Sect. 5.
[4] Sect. 12.

of the lands at length, but that it should be sufficient to describe them by reference in the way afterwards to be detailed; (7.) and that all conveyances, with warrants of registration, and all notarial instruments authorised by the Act to be recorded in the Register of Sasines, might be recorded at any time during the life of the party on whose behalf the same should be presented for registration.[1]

(7.) All conveyances, &c. to be recorded within lifetime of party.

With regard to the form of the charter, the Titles to Land (Scotland) Act, 1858, as the provisions referred to show, made it unnecessary to insert a precept of sasine, and allowed in place of a full description of the lands a short description in statutory form of them.

Changes in form of charter.

The changes effected by the Act in constituting the feudal relationship, or in taking infeftment under a charter, were important. If the charter contained a sufficient description of the lands, or a description by reference of them in the form allowed by the Act, and did or did not contain a precept of sasine in the form in use prior to the Infeftment Act, 1845, or in the form introduced by that Act, the disponee could have taken infeftment by recording it, with a warrant of registration in his favour. If the feu was contained in a deed granted for further purposes and objects, or if the deed containing the feu conveyed separate lands or separate interests in the same lands to the same or different persons, the disponee, in any of these cases, provided the lands feued to him were described sufficiently or by reference in statutory form, could complete his title either by recording the whole of the deed containing the lands feued, or, if such deed contained a clause of direction, by recording such parts of the deed as related to the lands feued; or, whether or not such deed contained a clause of direction, by expeding and recording a notarial instrument in the form of schedule (B) of the Act. In all cases where a charter (or other conveyance) contained a precept of sasine applicable to the lands, the

Infeftment after 1858.

[1] 21 and 22 Vict., c. 76, sect. 19.

disponee could also complete his title by having expede and recorded an instrument of sasine, which, if the precept was in the form in use prior to the Infeftment Act, 1845, could be in the form given in the Act, or in the long form in use prior to the Act, but which, if the precept of sasine was in the form introduced by the Act, had to be in the form given in the Act. If the deed containing the feu only described the lands disponed in feu in general terms, *e.g.*, "all the lands belonging to me," and whether it did or did not contain a precept of sasine, the disponee under it could not complete his title *de plano* by recording the deed with a warrant of registration; but he could either expede and record a notarial instrument in terms of schedule (H) of the Titles to Land Act, 1858, or, if it contained a precept of sasine, expede and record an instrument of sasine. Whether a notarial instrument or an instrument of sasine was expede, it had to narrate the disponer's infeftments in the lands disponed, and deduce the deed containing the general conveyance of them. Regarding what has been above stated about registration, it has to be observed that the charter, the notarial instrument, and the instrument of sasine, if in the form introduced by the Infeftment Act, 1845, could be recorded at any time within the life of the party on whose behalf the same was presented for registration, and that they required to be recorded either in the General Register of Sasines or in the appropriate Particular Register of Sasines. When an instrument of sasine in the form in use prior to 1845 was expede, the expeding had to be preceded by symbolical delivery, and the instrument had to be recorded within sixty days of its date.

(5.) *Charter and Infeftment in their present form.*

The feu-charter and infeftment in their present form are chiefly regulated by the Titles to Land Consolidation (Scotland) Act, 1868,[1] and the Conveyancing (Scotland) Act,

[1] 31 and 32 Vict., c. 101.

1874.[1] The former of these Acts was amended by the Titles to Land Consolidation (Scotland) Amendment Act, 1869.[2] The amendment consisted of the repeal of sections 22, 24, 62, 97, 118, 119, 130, and 141, and the substitution therefor of amended sections; and by section 10 of the Act of 1869 it is enacted that the amended sections shall be held to form part of the Act of 1868, and may hereafter be printed as forming portions thereof, in place of the several sections which it repealed. Before considering the charter in its present form, it is proper to point out that section 4 of the Titles to Land Consolidation (Scotland) Act, 1868, repealed *inter alia* the following Acts *in toto*:—

(1.) Lands Transference Act, 1847,[3]—"An Act to facilitate the Transference of Lands and other Heritages not held in Burgage Tenure."

(2.) Titles to Land (Scotland) Act, 1858,[4]—"An Act to simplify the Forms and diminish the Expense of completing Titles to Land."

The Titles to Land Consolidation Act, 1868, also repealed[5]—

(3.) Section 6 (dealing with the issuing of precepts from Chancery) of the Infeftment Act, 1845.[6]

The Titles to Land Consolidation (Scotland) Act, 1868, in consolidating the law of conveyancing relating to heritable rights, re-enacted, with variations, most of the provisions of the different Acts which it had repealed.

The form[7] of the feu-charter which is now in use is as follows:—

I, A (*full name and designation of superior*), heritable proprietor of the subjects herein-after disponed, IN CONSIDERATION of the sum of £ sterling instantly paid to me by B (*full name and designation of vassal*), of which I hereby acknowledge the receipt, and of the feu-duty and other prestations after specified (*if any other consideration*, 1. Narrative or Inductive clause.

[1] 37 and 38 Vict., c. 94.
[2] 32 and 33 Vict., c. 116.
[3] 10 and 11 Vict., c. 48.
[4] 21 and 22 Vict., c. 76.
[5] Sect. 4.
[6] 8 and 9 Vict., c. 35.
[7] Jur. Styles, vol. i., 11; Hendry's Styles, 15.

2. Dispositive clause.

onerous or gratuitous, exists, here state it), DO hereby SELL and in feu-farm DISPONE to and in favour of the said B, and his heirs and assignees whomsoever, heritably and irredeemably, ALL and WHOLE (*here describe the subjects intended to be conveyed, adding*)—Together with my whole right, title, and interest in the *dominium utile* of said subjects (*and if there are any reservations, real burdens, conditions, &c., under which the charter is to be granted, say*)—But always with and under the reservations, real burdens, conditions, provisions, restrictions, and qualifications (*or such of these as may be applicable*) following, viz. (*here insert them, and add*) All which reservations, burdens, conditions, &c. (*as the case may be*), are hereby declared real and preferable burdens upon and affecting the said subjects hereby disponed, and are appointed to be inserted in any notarial instrument to follow hereon, and to be inserted or validly referred to in all future deeds of transmission, decrees, instruments, or other writs, of or relating to the said subjects, or any part thereof, otherwise such deeds, decrees, instruments, and writs shall be void and null: WITH ENTRY at : TO BE HOLDEN, the

3. Date of entry.

said subjects, of and under me and my heirs and successors, as immediate

4. *Tenendas.*

lawful superiors thereof, in feu-farm, fee, and heritage for ever; FOR

5. *Reddendo.*

PAYMENT to me and my foresaids by the said B and his foresaids of the sum of £ sterling yearly, in name of feu-duty, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at for the half-year preceding, and the next term's payment thereof at following, and so forth at the said two terms in the year in all time thereafter, with a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof, and interest at the rate of five per centum per annum of the said feu-duty from the respective terms of payment during the non-payment of the same (*if any permanent increase of the feu-duty, or any fixed sums payable at fixed intervals have been stipulated for, here insert them*): AND I assign the writs, but to the

6. Assignation of writs.

effect only of maintaining and defending the right of the said B and his foresaids in the subjects hereby disponed; and for that purpose I oblige myself and my foresaids to make the same, to the extent of a legal progress, furthcoming to the said B and his foresaids, at their expense, on all necessary occasions, and that on a receipt and obligation to re-deliver the same within a reasonable time, and under a suitable

7. Assignation of rents.

penalty: AND I assign the rents: AND I bind myself and my foresaids

8. Obligation to relieve of public burdens.

to free and relieve the said B and his foresaids of all feu-duties and casualties, or sums of money in lieu thereof, payable to my superiors now and in all time coming, and of all public and parochial burdens exigible prior to said term of entry: AND I grant warrandice: AND I

9. Clause of warrandice.

consent to registration hereof for preservation.—IN WITNESS WHEREOF, these presents, written upon this and the preceding pages of stamped vellum (*or* paper) by C (*full name and designation*), clerk to D (*full name and designation*), are subscribed by me at upon

10. Clause of registration.

11. Testing clause.

the day of in the year One thousand eight hundred and , before these witnesses, E (*full name and designation*), and F (*also full name and designation*).

(*Signed*) A.

(*Signed*) E, *witness.*
F, *witness.*

I. NARRATIVE CLAUSE.—This clause sets forth (1.) the names and designations of the parties to the deed, and (2.) the cause of granting. By the law of Scotland every person who, possessing estate, heritable or moveable, is of full age and subject to no legal incapacity, can grant *inter vivos* or *mortis causa* deeds relating to it. It is usual, though not necessary, to describe in the narrative clause the disponer as "heritable proprietor" of the subjects disponed. By section 10 of the Stamp Act, 1870,[1] all the facts and circumstances affecting the liability of any instrument to *ad valorem* duty, or the amount of the *ad valorem* duty with which any instrument is chargeable, must be fully and duly set forth in the instrument under a penalty. 1. Narrative Clause.

II. DISPOSITIVE CLAUSE.—The dispositive clause is the ruling clause in a conveyance of lands. It contains (*a.*) the appropriate words of conveyance; (*b.*) the name of the disponee and the agreed-on destination; (*c.*) a description of the lands disponed; and (*d.*) the reservations, burdens, conditions, restrictions, and qualifications of the grant. 2. Dispositive Clause.

As to the appropriate words of conveyance it is usual for the disponer, in a charter, to *sell and in feu (or blench) farm, dispone,* if the charter is for an onerous consideration; and *to give, grant, and in feu (or blench) farm, dispone,*[2] if the charter is not for an onerous consideration. In a disposition, on the other hand, the disponer usually *sells and dispones* when the disposition is for an onerous consideration; and *gives, grants, and dispones* when the disposition is not for an onerous consideration. Prior to the Titles to Land Consolidation (Scotland) Act, 1868,[3] the word "dispone" was essential in conveyances of heritage *mortis causa.*[4] But by section 20 of that Act it was made competent, from and after the commencement of the Act, to any owner of lands to settle the Words of conveyance. History of word "dispone."

[1] 33 and 34 Vict., c. 97, sect. 10.
[2] Jur. Styles, vol. i., 15.
[3] 31 and 32 Vict., c. 101.
[4] *Kirkpatrick* v. *Kirkpatrick's Trustees,* 1873, 11 Macph., 557; aff. 1874, 1 R. (H.L.), 37. The previous cases are reviewed in this case by Lord Deas.

succession to the same in the event of his death, not only by conveyance *de præsenti*, according to the law and practice then existing, but likewise by testamentary or *mortis causa* deeds or writings; and it was declared that no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which should have been granted by any person alive at the commencement of the Act, or which should be granted by any person after the commencement of the Act, should be held to be invalid as a settlement of the lands to which such deed or writing applied, on the ground that the granter had not used with reference to such lands the word "dispone," or other word or words importing a conveyance *de præsenti*.[1] The general opinion was and is that the word "dispone" was indispensable in an *inter vivos* conveyance of land, coming into operation before the passing (7th August 1874) of the Conveyancing (Scotland) Act, 1874.[2] Section 27 of the Conveyancing Act, 1874, provides, however, that "it shall not be competent to object to the validity of any deed or writing as a conveyance of heritage coming into operation after the passing of this Act on the ground that it does not contain the word 'dispone,' provided it contains any other word or words importing conveyance or transference, or present intention to convey or transfer." Professor Montgomerie Bell, speaking of the absence of the word "dispone" in an onerous *inter vivos* conveyance of land under the law as it was prior to the passing of the Conveyancing (Scotland) Act, 1874, says—"Without that word it may not be effectual as a direct means of divesting the old and investing the new proprietor; but, at all events, it will be effectual as an obligation, and, if necessary, the foundation of a suit at the new proprietor's instance for obtaining a judicial conveyance and investiture,—that is, an adjudication in implement."[3] It was settled that a

Testamentary deeds do not now require *de præsenti* words of conveyance.

Inter vivos deeds require *de præsenti* words of conveyance, or words importing present intention to convey.

[1] See Begg's Conveyancing Code, 65.

[2] 37 and 38 Vict., c. 94; see Menzies, 538; Bell's Lect., vol. i., 583, 584.

[3] Bell's Lect., vol. i., 585; and see *Reid* v. *Young*, 1838, 16 S., 363.

mortis causa conveyance without the word "dispone" coming into operation before the Titles to Land Consolidation (Scotland) Act, 1868, did not constitute such an obligation in favour of the grantee under it.[1]

Name of grantee and agreed-on destination.

After the words of alienation come the name of the grantee and the agreed-on destination. The conveyance in a charter or disposition is generally in favour of the grantee, and his heirs and assignees whomsoever. But a conveyance to the disponee alone is equivalent to a conveyance in favour of the disponee and his heirs and assignees.

It is the practice to close the words of conveyance in a feu-charter or disposition[2] with the words "heritably and irredeemably"; but the words are unnecessary.[3]

Description of lands.

After the destination in a charter or a disposition is the description of the subjects conveyed. "There is no invariable rule," says Menzies,[4] "as to the manner in which the lands must be described. Only this is indispensable, that means be furnished for ascertaining with certainty the lands or other subjects conveyed." Erskine remarks of the dispositive clause: "Here the grantee must be described by his name and designation; and also the particular subject disponed by its special boundaries or march-stones, or by its situation, or other characters, so that it may be distinguished from all others; for the conveyance of an uncertain subject is inept and ineffectual."[5] It may be said that there are six classes of description:—(1.) general descriptions; (2.) particular descriptions; (3.) descriptions by statutory reference; (4.) descriptions by general name, in terms of section 13 of the Titles to Land Consolidation (Scotland) Act, 1868; (5.) descriptions in general terms; and (6.) descriptions by reference, not in statutory form.

Classes of description.

General descriptions.

In a general description, the description consists simply of the name of the lands, without any specification of measure-

[1] See authorities cited in *Kirkpatrick, supra.*
[2] Jur. Styles, vol. i., 60.
[3] Bell's Lect., vol. i., 588.
[4] Menzies, 541.
[5] Ersk. 2, 3, 23.

ment or boundaries;[1] and general descriptions are appropriate to the conveyances of old estates which have not been subdivided,[2] or of lands which have been erected into a barony.[3]

Particular descriptions.

In a particular description, the lands are described often by boundaries, not infrequently by measurement and boundaries, with or without reference to a plan, and the parish and the county in which the lands lie are invariably stated. Often in a charter or a disposition there is a general description, followed by an enumeration of particulars. Where the description was of "the whole mains," containing, according to the dispositive clause, certain lands possessed by persons named, it was held that the conveyance only carried the lands which were possessed by the persons named, and not two other subdivisions of the lands, although they were known as part of the mains.[4] In referring to the case of *Murray*, and of the danger of curtailing a general description by an enumeration of particulars (in accordance with the principle which restricts what is general to the particulars of which it is said to consist), Professor Menzies observes: "When it may be necessary from any circumstance, therefore, to give the particulars, the enumeration ought to be guarded by such words as leave the conveyance still to depend upon the general description,—as, for instance, *or of whatever other or additional parcels the said lands of A. may consist.*"[5] The case of *Murray* is an authority in favour of the general rule that a general description qualified by a reference to possession on the part of the disponer or others will tax the grant; but such a reference may not always require to be construed as taxative. At least, unbroken prescriptive possession of the whole lands, and not simply of the parts said to be possessed by particular persons at the date of

[1] Menzies, 541.
[2] *Ibid.*
[3] Menzies, 541; Bell's Lect., vol. i., 589.
[4] *Murray* v. *Oliphant's Wife*, 1634, M. 2262.
[5] Menzies, 542; and see Bell's Lect., vol. i., 594.

the conveyance, may, despite the reference, give a title to the whole lands.[1]

Descriptions by reference in statutory form.

Descriptions by reference in statutory form were first introduced by the Titles to Land (Scotland) Act, 1858.[2] By section 15 of that Act (which only applied to subjects held by feudal or blench tenure) it was enacted that where lands had been particularly described in any prior conveyance or other writ duly recorded in the appropriate Register of Sasines, it should not be necessary, in any subsequent conveyance or writ containing or referring to the whole or any part of such lands, to repeat the particular description of the lands at length, but that it should be sufficient to specify (1.) the leading name or names, or other short distinctive description of the lands conveyed, and (2.) the name of the county, and (3.) the parish or supposed parish in which the lands lay, and to refer to (4.) the particular description contained in the prior conveyance or other writ so recorded, in or as nearly as might be in the manner set forth in schedule (L) No. 1 of the Act. Section 15 of the Act of 1858 was repealed by section 34 of the Titles to Land Burgage (Scotland) Act, 1860,[3] which made it necessary, in describing lands already particularly described in a conveyance, &c. duly recorded in the appropriate Register of Sasines, only to specify (1.) the name of the county, and, where the lands were held burgage, the name of the burgh and county, in which they were situated, and to refer to the (2.) particular description contained in the prior conveyance, &c. so recorded. Both the Titles to Land (Scotland) Act, 1858, and the Titles to Land Burgage (Scotland) Act, 1860, were repealed by the Titles to Land Consolidation (Scotland) Act, 1868,[4] and section 11 of the Act of 1868 enacted that, in all cases where any lands had been particularly described in any prior conveyance or deed of or relating thereto, recorded in the appropriate Register of Sasines, it should not be necessary in

Enactments of Act of 1858 regarding descriptions by reference.

Enactments of Act of 1860 regarding such descriptions.

Enactments of Act of 1868 regarding such descriptions.

[1] See *Gardner* v. *Scott*, 1839, 2 D. 185; rev. 1843, 2 Bell's App., 129.

[2] 21 and 22 Vict., c. 76.

[3] 23 and 24 Vict., c. 143.

[4] 31 and 32 Vict., c. 101.

any subsequent conveyance or deed conveying or referring to the whole or any part of such lands, to repeat the particular description of the lands, but that it should be sufficient to specify (1.) some leading name or names or some distinctive description of the lands, as contained in the titles thereto, and (2.) the name of the county, and, where the lands are held by burgage tenure or by any similar tenure, the name of the burgh and county in which they were situated, and (3.) to refer to the particular description of such lands as contained in such prior conveyance or deed so recorded, in or as nearly as might be in the form set forth in schedule (E) of the Act. Section 11 of the Consolidation Act, 1868, has been repealed by section 61 of the Conveyancing Act, 1874, which is as follows :—

Existing enactments in Act of 1874.

> "Section 11 of 'The Titles to Land Consolidation (Scotland) Act, 1868,' is hereby repealed; and it is provided that in all cases where any lands have been particularly described in any conveyance, deed, or instrument of or relating thereto, recorded in the appropriate register of sasines, it shall not be necessary in any subsequent conveyance, deed, or instrument conveying or referring to the whole or any part of such lands, to repeat the particular description of the lands at length; but it shall be sufficient to specify the name of the county, and where the lands were held by burgage or by any similar tenure prior to the commencement of this Act, the name of the burgh and county in which the lands are situated, and to refer to the particular description of such lands as contained in such prior conveyance, deed, or instrument so recorded in or as nearly as may be in the form set forth in schedule O, hereto annexed; and the specification and reference so made in any such subsequent conveyance, deed, or instrumeut, whether dated prior or subsequent to the commencement of this Act, shall be held to be equivalent to the full insertion of the particular description contained in such prior conveyance, deed, or instrument, and shall have the same effect as if the particular description had been inserted in such subsequent conveyance, deed, or instrument exactly as it is contained in such prior conveyance, deed, or instrument; and it is further provided, that it shall not be competent, notwithstanding the terms of the section hereby repealed, or the form of the schedule therein referred to, to object to any specification and reference to any particular description of lands contained in any conveyance, deed, or instrument recorded prior to the commencement of this Act, provided such specification and reference states correctly the name of the county, and where the lands were held by burgage or by any similar tenure prior to the commencement of this Act, the name of the burgh and county in which the lands are situated, and refers correctly to the prior recorded conveyance, deed, or instrument containing the particular description of such lands; and where any

conveyance, deed, or instrument recorded prior to the commencement of this Act contains a specification and reference stating these particulars correctly, the specification and reference so made shall be held to have been equivalent to the full insertion of the particular description contained in the prior conveyance, deed, or instrument referred to, as if the particular description had been inserted in such recorded conveyance, deed, or instrument exactly as it is contained in the prior conveyance, deed, or instrument referred to."

Schedule O is in these terms :—

"The lands [*or* subjects] and others [*or* the lands delineated and coloured on a copy of the Ordnance Survey map hereto annexed, and signed as relative hereto], [*or* the lands of *A.* and others], [*or* the house No. 10 Street and others], [*or other like short description*] in the county of [*or* in the burgh of and county of *as the case may be*], being the lands [*or* subjects] particularly described in the disposition [*or other conveyance, deed, or instrument, as the case may be*] granted by *C.D.*, and dated [*insert date*] and recorded in the [*specify register of sasines*] on the day of [*or* as particularly described in the instrument of sasine *or* notarial instrument recorded, *&c., or as the case may be. If part only of lands is conveyed, describe such part as above, and add,* being part of the lands particularly described, *&c., or thus,* being the lands [*or* subjects] as particularly described, *&c.*, with the exception of, and [*describe the part excepted*]."

Essentials of a description by reference in statutory form now.

From the terms of section 61 and schedule O of the Conveyancing (Scotland) Act, 1874, it will be seen that the essentials in a description by reference are—

(1.) Specification of the name of the county, and, where the lands were held by burgage or by booking prior to the commencement of the Act, specification of the name of the burgh and county in which the lands are situated.

(2.) Reference to the particular description of the lands, as contained in any conveyance, deed, or instrument of or relating thereto, the writ containing the particular description being identified by a statement of its date, the fact that it is recorded in a specified Register of Sasines, and its date of recording.

It is recommended that in all cases of description by reference under section 61 of the Conveyancing (Scotland) Act, 1874, there should be some short description given of the subjects, such as is indicated in schedule O. Even

although such a short description may not be essential, yet, if there is a fatal defect in the reference to the recorded writ containing the particular description, it may, apart from the reference, be sufficient to identify the subjects. For instance, the description of subjects conveyed in a bond and disposition in security was as follows:—"All and Whole that piece of ground fronting Baker Street of Aberdeen, in the burgh and county of Aberdeen, being the subjects and others particularly described in the feu-charter thereof granted by Basil John Fisher, residing now or lately in Aberdeen," and certain other persons named and designed, "in my" [*i.e.*, Murray, the granter's] "favour, dated the 6th and 7th, and recorded in the division of the General Register of Sasines applicable to the county of Aberdeen on the all days of November 1882." On Murray, the granter's estates being sequestrated, the trustee pleaded that the bond was invalid as a heritable security in respect—(1.) that, on account of the omission of the date of recording the feu-charter, the description by reference was invalid; and (2.) that, apart from the description by reference, the subjects were not sufficiently identified. Both the Lord Ordinary (Trayner) and the First Division rejected the first of these two contentions, holding that the omission to state the day of the month on which the prior deed was recorded did not invalidate the subsequent deed. The second contention, with which the First Division did not find it necessary to deal, was also rejected by the Lord Ordinary. Assuming that he might have taken too liberal a view of the requirements of the Act as to description by reference, he was of opinion that the trustee's second contention was wrong; and, in holding that there could be no doubt about the identity of the subjects over which the bond was granted, he said—"In the first place, the subjects are described as Murray's property in Baker Street, Aberdeen, and it is not said that Murray had any property in that street except one. In the second place, it is not Murray's property in Baker Street, but

the property conveyed to him by certain persons fully designed by a certain deed fully described. I think these things, which appear *ex facie* of the bond, are quite sufficient to identify the subject of the security."[1]

Descriptions by general name in terms of section 13 of Act of 1868.

Repealing and re-enacting, with verbal alterations, section 16 of the Titles to Land (Scotland) Act, 1858,[2] section 13 of the Titles to Land Consolidation (Scotland) Act, 1868,[3] provides that, where several lands are comprehended in one conveyance in favour of the same person or persons, it shall be competent to insert a clause in the conveyance declaring that the whole lands conveyed and therein particularly described shall be designed and known in future by one general name to be therein specified; and that on the conveyance containing such clause, whether dated before or after the commencement of the Act, or on an instrument following thereon, whether dated before or after the commencement of the Act, and containing such particular description and clause, being duly recorded in the appropriate Register of Sasines, it shall be competent in all subsequent conveyances and deeds, and discharges, of or relating to such several lands, to use the general name specified in such clause as the name of the several lands declared by such clause to be comprehended under it. Such subsequent conveyances, and deeds, and discharges, of or relating to such several lands, under the general name so specified, the section provides, shall be as effectual in all respects as if the same contained a particular description of each of such several lands, exactly as the same is set forth in such recorded conveyance or instrument; provided that reference be made in, or as nearly as may be in, the terms set forth in schedule (G) of the Act, in such subsequent conveyance, &c., to a duly recorded conveyance or instrument in which such particular description and clause are contained. The section also enacts that it shall not be necessary in such

[1] *Murray's Trustee* v. *Wood*, 1887, 14 R., 856; see also *Cattanach's Trustee* v. *Jamieson*, 1884, 11 R., 972.

[2] 21 and 22 Vict., c. 76.

[3] 31 and 32 Vict., c. 101.

clause to comprehend under one general name the whole lands contained in the conveyance in which such clause is inserted, but that it shall be competent to comprehend certain lands under one general name and certain other lands under another general name, it being clearly specified what lands are comprehended under each general name.

Descriptions in general terms.

By a description in general terms is meant such a description as either of the following:—"All and Whole the lands, wherever situated," belonging to the disponer; or "All and Whole the lands situated" in a certain parish or county belonging to the disponer. Such a description is seldom if ever found in a feu-charter or in an ordinary disposition; and, as will be pointed out hereafter, deeds containing descriptions in general terms can only be used as midcouples in making up a feudal title to the lands, whereas disponees under deeds containing general descriptions, or particular descriptions, or descriptions by statutory reference, or descriptions by general name, in terms of section 13 of the Titles to Land Consolidation (Scotland) Act, 1868, can take infeftment under them *de plano* by recording them, with a warrant of registration, in the appropriate Register of Sasines.

Descriptions by reference not in statutory form.

Lands may also be described in a conveyance as the lands contained in a certain deed which, whilst sufficiently identified, is not identified in accordance with the enactments regarding descriptions by reference. Thus, a disponer may dispone to a disponee the lands described in a deed identified by giving the name of the disponer under it, and the date of its execution. This description will not warrant infeftment *de plano* under the conveyance containing it; but, like a conveyance with a description in general terms,—in one sense, the description in question is a description in general terms, although it will be better to confine in the sequel a description in general terms to those cases in which there is no reference to any deed containing a description of the lands,—the conveyance can be used as a midcouple in the completion of the disponee's title.

Descriptions bounding or non-bounding.

Again, the description in a feu-charter or disposition may constitute a *bounding charter* or *bounding title*,—in other words, descriptions are either bounding wholly or partially,[1] or not bounding as regards the limits of the grant. "The peculiarity of a bounding charter is," as Mr. Rankine says, "that no amount of possession under it of a corporeal subject beyond the limits can enable the possessor to vindicate the ownership thereof. He owns so much as his charter gives him: to acquire in that way property in anything beyond would be to fly in the face of his title."[2] A bounding charter or a bounding title may be constituted—(1.) by specific boundaries,—*e.g.*, by the boundaries of the subjects disponed being stated to be certain walls,[3] streets,[4] towing paths,[5] &c.; (2.) by boundaries and non-taxative measurements combined, the boundaries in this case overriding the measurements, in accordance with the general rule that boundaries, if clear, although they are accompanied by other particulars, must rule, the other particulars being held as demonstrative or illustrative;[6] (3.) by taxative, as opposed to demonstrative, measurements,—as, *e.g.*, when words plainly taxative, such as "only" or some corresponding expression, are applied to the measurements,[7] or when the extent is made an inherent quality of the bargain, as when the price or feu-duty depends on the extent, in which cases the measurements will dominate over the physical description or general name;[8] (4.) by measurements which, taken along with the specification of certain boundaries, bring out precisely the whole of the boundaries, so as to make the enclosed space a matter of certainty;[9] (5.) by stating that

How bounding title constituted.

[1] *Girdwood* v. *Paterson*, 1873, 11 Macph., 647.

[2] Rankine on Land Ownership, 91.

[3] *Smyth* v. *Allan*, 1813, 5 Pat., 669.

[4] *Duke of Buccleuch* v. *Magistrates of Edinburgh*, 1864, 2 Macph., 1114; 1865, 3 Macph., 528.

[5] *Fleming* v. *Baird*, 1841, 3 D., 1015.

[6] See Rankine on Land Ownership, 92, and authorities there cited; and see *Currie* v. *Campbell*, 1888, 16 R., 237.

[7] Duff's Feudal Conveyancing, 63; Rankine on Land Ownership, 92; Bell's Lect., vol. i., 599.

[8] *Hepburn* v. *Campbell*, 1781, M. 14,168; and see *Harley* v. *Campbell*, 1822, 1 S., 238; and Lord President in *Hunter* v. *Lord Advocate*, 1869, 7 Macph., 899.

[9] Lord Ardmillan in *Stewart* v. *Greenock Harbour Trustees*, 1866, 4 Macph., 283.

the lands lie within a certain area, as in a particular parish[1] or county;[2] or (6.) by a reference, it may be, to a plan for the boundaries; but where there is a reference to a plan accompanied by other descriptions for the boundaries,[3] it depends on the circumstances of each case whether the plan will overrule the other descriptions, or be overruled by them.[4] In a recent case[5] concerning descriptions, subjects were described not only by boundaries, but also by measurements and a reference to a plan. The measurements and plan, which agreed, were inconsistent with the specified boundaries, and a majority of the Second Division held that the description by boundaries must prevail. Although the rule of law is that a person possessing under a bounding title cannot acquire by prescriptive possession the ownership of a corporeal subject lying beyond the limits of his title,[6] he may yet acquire, in virtue of his title and prescriptive possession thereon, a right of servitude[7] or incorporeal rights, such as salmon fishings,[8] beyond his express boundaries; and a proprietor, if he is not excluded by his own boundaries, can acquire by prescription lands which lie within the boundaries of another proprietor as part and pertinent of his own lands, because he cannot be limited by the boundaries of another.[9]

Servitudes, &c. may be acquired beyond bounding title.

There are various other points connected with boundaries which require to be noticed. A rule, subject to exceptions, is, that what is described as the boundary of subjects is excluded therefrom. Thus, if subjects are bounded in the titles "by" walls, the walls do not fall to the disponee;[10] but if the

Points connected with boundaries.

"By" walls, &c.

[1] *Hepburn* v. *Duke of Gordon*, 1823, 2 S., 525; *Gordon* v. *Grant*, 1850, 13 D., 1.

[2] Bell's Lect., vol. i., 597.

[3] Lord President in *North British Railway* v. *Magistrates of Hawick*, 1862, 1 Macph., 200.

[4] See Rankine on Land Ownership, 94, and authorities there cited.

[5] *Currie* v. *Campbell*, 1888, 16 R., 237.

[6] Stair 2, 3, 36; Ersk., 2, 6, 3; Rankine on Land Ownership, 91 *et seq.*

[7] *Beaumont* v. *Lord Glenlyon*, 1843, 5 D., 1337.

[8] *Earl of Zetland* v. *Tennent's Trustees*, 1873, 11 Macph., 469; and see *Earl of Dalhousie* v. *M'Inroy*, 1865, 3 Macph., 1168.

[9] Ersk. 2, 6, 3; *Earl of Fife's Trustees* v. *Cuming*, 1830, 8 S., 326.

[10] *Smyth* v. *Allan*, 1813, 5 Pat., 669.

subjects are described as "enclosed by"[1] walls, the walls will be part of them, and, when it is desired to make walls common property, the centre of them should be declared the line of the boundary.[2] A boundary "by" a highway is exclusive of the highway,[3] and a boundary "by" a street is exclusive of the street.[4] A boundary by the bank of a canal has been held to mean the outer line of the towing path.[5] In questions between subject-superiors and vassals, a boundary by the sea,[6] or the sea beach,[7] or by the seashore,[8] or a navigable and tidal river,[9] gives a right of property in the foreshore, subject to the rights of navigation and other rights which the public have in it. A title to land described as bounded by the sea-flood, the full sea, or the flood-mark or high-water mark, appears to exclude the foreshore, and prevents the disponee from acquiring the foreshore by prescriptive possession;[10] but it has been held that if a proprietor feus out a subject adjacent to the sea or to a navigable and tidal river, giving the feuar the sea-flood or the flood-mark as his boundary, and having himself no express title to the foreshore, he gives the feuar everything between the landward boundary of the feu and the river or the sea, and he is not entitled to interpose himself between the feuar and the sea,—in other words, he, in a question between himself and his feuar, is held to have given to his feuar all the estate and interest in the foreshore which he

"By" high way, &c.

"By" sea, &c.

[1] See *Wilson* v. *Laing*, 1844, 7 D., 113.

[2] Bell's Lect., vol. i., 600.

[3] *Ewing* v. *York*, 1857, 20 D., 351; and see Rankine on Land Ownership, 98. 99.

[4] *Duke of Buccleuch* v. *Magistrates of Edinburgh*, 1864, 2 Macph., 1114; 1865, 3 Macph., 528.

[5] *Fleming* v. *Baird*, 1841, 3 D., 1015.

[6] *Magistrates of Culross* v. *Earl of Dundonald*, 1769, M. 12,810; *Campbell* v. *Brown*, 1813, F.C., 444; *Boucher* v. *Crawford*, 1814, F.C., 64.

[7] *Cameron* v. *Ainslie*, 1848, 10 D., 446.

[8] *Magistrates of Culross* v. *Geddes*, 1809, Hume 554; *Boucher*, *supra*; and see *Cameron* v. *Ainslie*, 1848, *supra*; *Officers of State* v. *Smith*, 1846, 8 D., 711, aff. 1849, 6 B. App., 487.

[9] *Todd* v. *Clyde Trustees*, 1840, 2 D., 357, aff. 2 Rob. App., 333; *Berry* v. *Holden*, 1840, 3 D., 205.

[10] See *Smart* v. *Magistrates of Dundee*, 1797, 3 Pat., 606; *Suttie* v. *Gordon*, 1837, 15 S., 1037; *Todd* v. *Clyde Trustees*, 1840, 2 D., 357; aff. 1841, 2 Rob., 333; *Kerr* v. *Dickson*, 1840, 3 D., 154, aff. 1 Bell's App., 499; *Berry* v. *Holden*, 1840, 3 D., 205; *Magistrates of St. Monance* v. *Mackie*, 1845, 7 D., 582; and see Rankine on Land Ownership, 95.

himself had, whatever that may be.[1] When land is described as bounded by, or is *de facto* bounded by, a river which is non-tidal yet navigable,[2] or non-tidal and non-navigable, or by a mere stream,[3] the disponee is entitled to the half of the *alveus* of the stream *ex adverso* of his lands, and the *medium filum* is taken to be his boundary.

"By" river.

What the disponee under a charter or disposition acquires.

Boundaries having been dealt with, it has next to be shown what estate passes to the disponee under a feu-charter or a disposition of lands. The disponee gets not only the *solum*, but also all "that forms a proper part of the land, from the sky to the centre."[4] "So long," says Mr. Rankine, of the disponee's rights, "as the element of prescription is left out of account, and there is no dispute as to the identity of the subject, nor any express limitation in the grant, the title of the land is held as including everything *a cœlo ad centrum*, within the boundaries as drawn on the surface, and the direction of the plumb line let fall therefrom, and produced indefinitely upwards and downwards."[5] It is customary to insert, after the description of the lands, the words "with the parts and pertinents of the said subjects," but these words are unnecessary, as they carry nothing beyond what is contained in the description. This rule about parts and pertinents has been stated in these words by Lord Justice-Clerk Hope[6]—"A grant of the lands of A is as extensive as a grant of the lands of A with parts and pertinents. The question is, what lands fall under the designation of A as known in the country, and by what limits are they circumscribed?"

A grant of lands is as extensive as a grant with parts and pertinents.

Regalia do not pass as part and pertinent.

The *regalia*, however, do not pass as part and pertinent of lands under a Crown grant. The *regalia majora*, which include the Sovereign's right of superiority, cannot be communicated to a subject. The *regalia minora*, include, *inter alia*, navigable rivers, highways, salmon fishings, ports and harbours, ferries,

[1] *Hunter, &c.* v. *Lord Advocate, &c.*, 1869, 7 Macph., 899; *Magistrates of Montrose* v. *Commercial Bank*, 1886, 13 R., 947; and see Lord President Inglis' remarks on *Berry, supra*, in *Hunter*, 7 Macph., 907.

[2] See Rankine on Land Ownership, 236, 237.

[3] *Ibid.* 98.

[4] Bell's Prin., sect. 737.

[5] Rankine on Land Ownership, 156.

[6] *Gordon* v. *Grant*, 1850, 13 D., 1.

mines of gold, mines yielding a certain portion of silver, &c., and they, with the exception of navigable rivers and highways, can be acquired by express grant from the Crown or by prescription on a habile title.[1] Speaking of the *regalia minora*, Professor George Joseph Bell[2] says—"*Regalia* are excepted from the ordinary rule of pertinents, and even when granted by the Crown to a vassal they are not held to be transferred from that vassal by a conveyance of the land unless expressly mentioned." The foreshore is sometimes spoken of as one of the *regalia minora;* but it is rather the right[3] of the public to use the foreshore for certain public uses which is one of the *regalia*, and the foreshore can only be acquired in property subject to such uses. It is important to notice how a title can be acquired to (*a.*) foreshores, and (*b.*) salmon fishings.

Foreshores.

Extent of foreshore.

The foreshore is the land that lies between high and low water mark, the water mark being, according to the Lord Ordinary's judgment in *Bowie* v. *Ailsa*,[4] and dicta in certain Inner House cases,[5] the line of ordinary spring-tides, and not, as is laid down in an English decision,[6] the line of medium tides between the spring and the neap tides in each quarter of a lunar revolution during the year. When an estate—barony or not—is *de facto* situated on the seashore, and the disposition from the Crown thereof does not, by express grant or specific boundary, extend the right of the disponee beyond high-water mark, there is no presumption that the foreshore is a pertinent of the land.[7] But a right of property in the foreshore, subject to the public uses of navigation and fishing, can be acquired—(1.) by express grant thereof from the

How title to foreshore acquired.

[1] Bell's Lect., vol. i., 606.

[2] Bell's Prin., sect. 748; but see *Lord Advocate* v. *M'Culloch*, 1874, 2 R., 27 (about salmon fishings), and *Earl of Breadalbane* v. *Jamieson*, 1875, 2 R., 826 (about gold and silver mines.)

[3] *Agnew* v. *Lord Advocate*, 1873, 11 Macph., 309.

[4] 1887, 14 R., 649.

[5] See *Nicol* v. *Blaikie*, 1859, 22 D., 335, 342; *Officers of State* v. *Smith*, 8 D., 721; and interlocutor in *Agnew* v. *Lord Advocate*, 1873, 11 Macph., 309; and see Rankine on Land Ownership, 217; Bell's Prin., sect. 641.

[6] *Attorney-General* v. *Chambers*, 1854, 4 De G. M. and G., 206.

[7] *Agnew* v. *Lord Advocate*, 1873, 11 Macph., 309, in which prior cases as to foreshore are reviewed.

Crown;[1] (2.) by such long-continued possession as can only be ascribed to a right of property under a Crown charter which does not, by express grant or specific boundaries, extend the right of the vassal beyond the high-water mark;[2] (3.) by a grant of land from the Crown described in the conveyance as bounded by the sea;[3] (4.) by prescriptive possession of the foreshore in virtue of a title granted by a subject to lands described as bounded by the sea;[4] or (5.) by prescriptive possession of the foreshore in virtue of a title granted by a subject to lands bounded *de facto*, although not expressly, by the sea;[5] and that whether or not the title in the two last cases proceeded *a non habente potestatem.*

How title to salmon fishings acquired.

For centuries the right of salmon fishing has been regarded as one of the *regalia minora.* A title to salmon fishings can be acquired (1.) by express grant thereof from the Crown, either alone or by a clause *cum piscationibus salmonum* in the dispositive clause of a Crown charter of lands;[6] (2.) by prescriptive possession of salmon fishing on a barony title with or without a general clause of fishings;[7] (3.) by prescriptive possession of salmon fishing on a Crown charter of lands not a barony, with a general clause of fishings;[8] (4.) by prescriptive possession of salmon fishing on an express grant thereof in a conveyance granted by a subject-superior;[9] and (5.) by prescriptive possession of salmon fishing on a title to land with a general clause of fishings.[10] A clause of fishings

[1] See *Agnew* v. *Lord Advocate, supra; Lord Advocate and Clyde Trustees* v. *Lord Blantyre*, 1879, 6 R. (H.L.), 72.

[2] See *Agnew* v. *Lord Advocate, supra; Lord Advocate and Clyde Trustees* v. *Lord Blantyre, supra; Buchanan and Geils* v. *Lord Advocate*, 1882, 9 R., 1218.

[3] See Lord Justice-Clerk in *Agnew* v. *Lord Advocate, supra;* Lord Mure in *Lord Advocate and Clyde Trustees* v. *Lord Blantyre;* and Lord Watson in *Young* v. *North British Railway Company, infra.*

[4] *Young* v. *North British Railway Company*, 1885, 13 R., 314; aff. 1887, 14 R. (H.L.), 53.

[5] See dicta in *Agnew* v. *Lord Advocate, supra;* and in *Young* v. *North British Railway Company, supra.*

[6] See *Mackenzie* v. *Davidson*, 1841, 3 D., 646; *Richardson, &c.* v. *Baroness Gray*, 1876, 3 R., 1031, aff. 1877, 4 R. (H.L.), 76.

[7] *Nicol and Others* v. *Lord Advocate*, 1868, 6 Macph., 972.

[8] *Stuart* v. *M'Barnet*, 1866, 5 Macph., 753; alt. 1868, 6 Macph. (H.L.), 123.

[9] See *Stuart* v. *M'Barnet, supra; Lord Advocate* v. *M'Culloch*, 1874, 2 R., 27.

[10] *Lord Advocate* v. *Sinclair*, 1865, 3 Macph., 981; aff. 1867, 5 Macph. (H.L.), 97.

in the *tenendas* only of a Crown charter is not a habile title to which prescriptive possession of salmon fishing may be ascribed;[1] but it would appear that, in a question between a subject-superior and a vassal, a charter from a subject-superior with pertinents, and a clause of fishings in the *tenendas* only, would be a title to which prescriptive possession of salmon fishings could be ascribed against both the subject-superior and the Crown.[2] In establishing a right to salmon fishing by prescription the possession must be clear, and the rule is that possession must be by net and coble. Where, however, fishing by net and coble is impracticable, or probably where rod-fishing is more profitable, prescriptive possession may be established by rod-fishing.[3]

Teinds; when conveyed to a disponee.

With regard to teinds, Professor Menzies says—"Although teinds be disponed they are not separated from the lands until infeftment follows; and in such circumstances, therefore, a disposition of the lands will convey the teinds, although not expressly disponed, and the disponee will be entitled by the assignation of writs to take infeftment upon the open precept in the disposition of teinds.[4] When once separated, however, by being feudalised, a distinct title is requisite, and therefore, when teinds had been acquired by disposition subsequent to an entail of the lands, they were found not to be carried by the entail title.[5] In very special circumstances, however, intention to convey the teinds will be presumed; and it is a main element in creating the presumption if the disponee is burdened with payment of the minister's stipend. The authorities for giving weight to such presumption are cited in the report of the case of *Mansfield*, last referred to."[6]

After the description of the lands the disponer in a feu-

[1] *Lord Advocate* v. *Sinclair*, *supra*.
[2] *Lord Advocate* v. *M'Culloch*, *supra*.
[3] For authorities see Rankine on Land Ownership, 261, and see remarks in *Warrand's Trustees* v. *Macintosh*, 1888, 15 R., 833; aff. 1890, 17 R. (H.L.), 13.
[4] *Mansfield* v. *Robertson*, 1835, 13 S., 832.
[5] *Spalding* v. *Laurie*, 1784, M. 14,461.
[6] Menzies, 810; see also Duff's Feudal Conveyancing, 67; Bell's Prin., sect. 737; *Watt's Trustees* v. *King*, 1869, 8 Macph., 132.

Use of words "together with my whole right," &c.

charter usually adds the words, "together with my whole right, title, and interest in the *dominium utile* of said subjects,"[1] and the disponer in a disposition usually adds the words, "together with my whole right, title, and interest, present and future, therein."[2] Although the form of the words appropriate to a disposition were used in a feu-charter, they would only convey right, title, and interest consistent with the grant of a subfeu.[3] Either form of words is, however, unnecessary in an onerous conveyance with absolute warrandice, express or implied: such conveyance embraces subordinate or supervening rights, although not specially mentioned.[4] In gratuitous conveyances, without express absolute warrandice, the words ought to be used when the disponer desires to convey subordinate or supervening rights to his disponee.[5]

Dispositive clause, place for reservations, &c.

The appropriate place for reservations or conditions in favour of the parties under a feu-charter or a disposition is the end of the dispositive clause. Among such reservations or conditions are to be found in practice a reservation of mines and minerals, a right of pre-emption, a reservation of power to divide the superiority, a clause of irritancy *ob non solutum canonem*, provision for allocation of feu-duty, stipulations as to the erection of buildings, &c.

Reservation of mines and minerals.

Perhaps the most important reservation, often made by a disponer, is that of mines and minerals. The clause reserving the mines and minerals ought to contain (*a.*) a reservation to the disponer of the mines and minerals within or under the subjects disponed; (*b.*) a power to work them and carry them away; and (*c.*) a provision for payment of such damages as may be occasioned by the working of the mines and minerals to the surface of the land, or to the buildings erected or to be erected thereon.[6] The clause of reservation of mines and minerals should be as explicit as possible. In the

[1] Jur. Styles, vol. i., 11.
[2] *Ibid.*, vol. i., 90.
[3] Bell's Lect., vol. i., 608.
[4] See *Love* v. *Storie*, 1863, 2 Macph., 22.
[5] Bell's Lect., vol. i., 608.
[6] For form of clause, see Jur. Styles, vol. i., 18.

recent case of the *Magistrates of Glasgow* v. *Farie*,[1] the House of Lords, reversing the judgment of the First Division, held that the provisions of the Water-Works Clauses Act, 1847, section 18, which excludes from conveyances of lands purchased under the Act, unless when expressly mentioned, "mines of coal, ironstone, slate, or other minerals under any land purchased," did not apply to a seam of clay forming the subsoil of the lands disponed. "In construing," said Lord Watson in the case just cited, "a reservation of mines or minerals, whether it occur in a private deed or in an Enclosure Act, regard must be had not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. 'Mines' and 'minerals' are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used." If a disponer conveys lands reserving to himself the right to work the minerals, the conveyance is construed as a conveyance of the lands to the disponee, under reservation to the disponer of the right of property in the minerals.[2] If in a conveyance there is a clause of reservation of mines and minerals in favour of the disponer, and there is nothing said about power to work them, the disponer, it is thought, has such power, on the principle that the reservation embraces everything without which the reservation could not be used.[3] When the conveyance containing a reservation of mines and minerals is silent about payment of surface damage, &c., indemnity for such damage is nevertheless due to the disponee or his successors in the lands.[4] A disponer who reserves minerals may quite competently stipulate that he shall not be liable for any

"Mines and minerals" not definite terms.

Reserved right to work minerals.

Reservation implies powe to work.

Indemnity due for damage by working.

[1] 1887, 14 R., 346; rev. 1888, 15 R. (H.L.), 94, in which the English authorities are cited.

[2] *Duke of Hamilton* v. *Dunlop, &c.*, 1884, 11 R., 963, aff. 1885, 12 R. (H.L.), 65; and see *Graham* v. *Duke of Hamilton*, 1869, 7 Macph., 976, rev. 1871, 9 Macph. (H.L.), 98.

[3] See Bell's Lect., vol. i., 610; Rankine on Land Ownership, 153, and authorities there cited.

[4] See *Buchanan, &c.* v. *Andrew*, 1871, 9 Macph., 554, rev. 1873, 11 Macph. (H.L.), 13; *Livingstone* v. *Rawyards Coal Co.*, 1879, 6 R., 922; aff. 7 R. (H.L.), 1; *Neill's Trustees* v. *William Dixon (Limited)*, 1880, 7 R., 741.

damages done by the working and removing of the reserved minerals.[1] An obligation to pay "surface damages, if any," caused by working minerals, is not so restricted as to be applicable only to the state of the ground at the date when the ownership of the surface and that of the minerals were separated from each other.[2] When a proprietor feus or sells lands under reservation of the minerals, or disposes of the minerals reserving the lands, the minerals are severed from the *dominium utile*, and can be disponed as a separate tenement by the person in right of them.[3]

Clauses against subinfeudation only valid if made before 1874.

The Act 20 Geo. II., c. 50, abolished all clauses *de non alienando sine consensu superiorum.* This Act did not strike at the legality of conditions against subinfeudation, which are valid if they were made before the commencement of the Conveyancing (Scotland) Act, 1874,[4] and invalid if they are made after that date.[5] Neither of these two Acts, it is thought, has rendered illegal a clause of pre-emption in favour of the disponer of lands.[6] The clause of pre-emption[7] is an obligation imposed on a disponee, if he intends to sell the lands, to make the first offer to the disponer or his heirs and successors at the price at which he is prepared to sell to another.

Clause of pre-emption.

Superior may sell fee of superiority.

It has always been, even before the passing of the Act 20 Geo. II., c. 50,[8] open to the superior to sell his fee of superiority, and thereby substitute a new superior for himself.[9] But the superior cannot, without his vassal's consent or acquiescence, create a superiority intermediate between the vassal and himself.[10] Objection to an intermediate superiority is personal to the vassal,[11] and the right of objec-

Superior cannot, without vassal's consent or acquiescence, create intermediate superiorities or multiply superiors.

[1] *Buchanan, &c.* v. *Andrew, supra.*
[2] *Oswald* v. *Gordon*, 1853, 16 D., 70; and see *Neill's Trustees* v. *William Dixon* (*Limited*), *supra.*
[3] See Bell's Lect., vol. i., 611.
[4] See *Campbell* v. *Dunn*, 1828, 6 S., 679.
[5] 37 and 38 Vict., c. 94, sect. 22.
[6] See Bell's Lect., vol. i., 612; Bell's Prin., sect. 861; Jur. Styles, vol. i., 18.
[7] For form see Jur. Styles, vol. i., 19.
[8] Bell's Prin., sect. 855.
[9] *Ibid.* 856.
[10] *Douglas* v. *Torthorell*, 1670, M. 15,012; *Archbishop of St. Andrews* v. *Marquis of Huntly*, 1682, M. 15,015; *Hotchkis* v. *Walker's Trustees*, 1822, 2 S., 70; Bell's Lect., vol. ii., 753.
[11] Bell's Lect., vol. ii., 753; Bell's Prin., sect. 857.

tion may be lost by the long negative prescription.[1] The reason of this rule against the creation of intermediate superiorities was the fact that it was in the interest of the vassal to prevent the increase of the number of superiors between him and the Crown as the law stood before the commencement of the Conveyancing (Scotland) Act, 1874.[2] The vassal could not prior to the Conveyancing (Scotland) Act, 1874, and cannot now, object to his superior burdening the fee of superiority with real securities under which the creditors have a right to levy the feu-duty; because such securities (even when the holding in them was *a me vel de me* before 1874) did not, and do not now, in law interject an intermediate superior.[3] To allow the interjection of intermediate superiorities, the superior often before 1874 reserved power to that effect; but as a vassal has little, if any, interest to object to the interposition of mid-superiorities since the commencement of the Conveyancing (Scotland) Act, 1874, the reservation may fall into disuse. Similarly, where in a feu-charter there is one feu and one *reddendo*, the superior cannot, without the vassal's consent or acquiescence, convey in fee[4] or liferent[5] the undivided superiority in several divided portions, so as to make the vassal hold the *dominium utile* of more than one superior. But it is quite competent for a superior to convey a fee of superiority to two or more jointly and *pro indiviso*.[6] As in the case of interjecting an intermediate superiority, the objection to splitting the superiority is personal to the vassal, and the right of objection may be lost by the long negative prescription.[7] Although separate properties held of the same superior by different titles come into the hands of one person, and although the superior has entered that person in the whole as vassal, the

[1] Bell's Lect., vol. ii., 753.
[2] *Ibid.*
[3] *Home* v. *Smith*, 1794, M. 15,077; and see *Williams and James* v. *Maclaine's Trustees*, 1872, 10 Macph., 362; *Arnott's Trustees* v. *Forbes*, 1881, 9 R., 89.
[4] *Montrose* v. *Colquhoun*, 1781, M. 8822; aff. 1782, 6 Pat. App., 805.
[5] *Graham* v. *Westenra*, 1826, 4 S., 615.
[6] *Cargill* v. *Muir*, 1837, 15 S., 408
[7] Bell's Lect., vol. ii., 753.

superior will not be precluded from disponing the several fees of superiority separately, unless the entry has been by one charter or other writ including the different properties in one description, and not containing separate descriptions of the properties and their appropriate clauses of *reddendo*.[1] To prevent objection on the part of the vassal to the splitting of the superiority, there is sometimes inserted a clause reserving to the superior power to divide and dispose the *dominium directum* in such shares and proportions as he and his heirs and successors may think proper.[2]

Irritancy *ob non solutum canonem.*

The irritancy *ob non solutum canonem*, or tinsel of the feu, is often classed among the casualties of superiority, but it is rather a remedy against non-payment of the feu-duties,[3] or "a contingent irritancy for enforcing payment of feu-duties."[4] This irritancy was introduced by the Statute 1597, c. 250, which provides that if any vassal or feuar "failzie in making of payment of his few-dewty . . . be the space of twa zeires haill and togidder, they sall amitte and tine their said few of their saids lands, conforme to the civil and canon law, sicklike and in the same manner as gif ane clause irritant were specially ingrossed and insert in thar said infeftmentis of few-ferme." Nothwithstanding this enactment, it is not uncommon to find in feu-charters a conventional irritancy *ob non solutum canonem*.[5] To enforce the irritancy, whether based on the Statute 1597, c. 250,[6] or on a conventional clause,[7] it is necessary to raise an action of declarator.[8] Prior to 16th September 1887, the date of the passing of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887,[9] the irritancy could be purged by paying the

[1] *Dreghorn* v. *Hamilton*, 1774, M. 15,015 ; *Lamont* v. *Duke of Argyll*, June 23, 1813, F.C. ; rev. 1819, 6 Pat. App., 410 ; Bell's Lect., vol. ii., 754 ; Bell's Prin., sect. 859.

[2] For form of clause see Jur. Styles, vol. i., 20.

[3] Bell's Prin., sect. 701.

[4] Bell's Lect., vol. i., 625.

[5] For form see Jur. Styles, vol. i., 21.

[6] For form of summons see Jur. Styles, vol. iii., 62.

[7] For form of summons see *ibid.*, vol. iii., 63.

[8] Bell's Prin., sect. 701, and authorities there cited; and see Mackay's Court of Session Practice, vol. ii., 96.

[9] 50 and 51 Vict., cap. 69.

arrears of feu-duty and expenses at any time before the decree of declarator *ob non solutum canonem* was extracted, but not later.[1] By section 4 of the Act of 1887, however, it is enacted that—

> "No decree of declarator of irritancy at the instance of a superior against his vassal *ob non solutum canonem* obtained after the passing of this Act shall be deemed to be final until an extract thereof shall have been recorded in the appropriate Register of Sasines."[2]

Effect of irritating feu-right *ob non solutum canonem.*

If a feu-right is irritated *ob non solutum canonem*, whether in virtue of an irritant clause or under the Act 1597, cap. 250, the superior cannot claim arrears of feu-duty,[3] but he takes the land free from all burdens imposed on it by the vassal, and unaffected by any subfeu right granted by the vassal[4] without his consent. In the case of *Cassels*,[4] a majority of the whole Court held that a decree of declarator of irritancy *ob non solutum canonem*, whether conventional or under the Statute 1597, c. 250, annuls the vassal's rights and all that has followed thereon, including the rights of sub-vassals, and that without inferring any obligation on the superior to recompense sub-vassals for buildings erected by them on their subfeus; and in the case of *Sandeman*,[4] the House of Lords, reversing the decision of the Second Division, pronounced judgment to the same effect as that in *Cassels*. Sometimes a feu-right contains an express renunciation of the provision of irritancy contained in the Statute 1597, c. 250.[5]

Provisions for allocation of feu-duty.

As will be explained hereafter, the feu-duty is a *debitum fundi* on the lands feued, and although a vassal may, unless effectually prohibited by a condition against subinfeudation made before the commencement of the Conveyancing (Scotland) Act, 1874, subfeu the whole or part of his lands, every part of the lands remains, notwithstanding any subfeu, burdened with the whole of the feu-duty. The vassal

[1] See Bell's Lect., vol. i., 626.
[2] See Sturrock's Analysis, 194.
[3] *Magistrates of Edinburgh* v. *Horsburgh*, 1834, 12 S., 593.
[4] *Cassels, &c.* v. *Lamb*, 1885, 12 R., 722; *Sandeman* v. *Scottish Property Investment Co.*, 1883, 10 R., 614, rev. 1885, 12 R. (H.L.), 67.
[5] Bell's Lect., vol. i., 625.

may arrange with the superior to insert in the feu-right to be granted in his favour a clause by which the superior assents to a proportion of the *cumulo* feu-duty being allocated on parts of the lands in the event of the vassal's subfeuing or otherwise disponing his lands in separate parcels.[1] When the superior did assent to apportion the *cumulo* feu-duty and to restrict the amount exigible from different parts of the feu to certain sums, the allocation was carried out, prior to 1874, by a writ of progress or charter of *novodamus* from the superior, which contained a *reddendo* setting forth the feu-duty and casualties to be paid in time to come in respect of the ground to which it applied.[2] The allocation will now be carried into effect either by a charter of novodamus or —and this is the better way—by a memorandum of allocation of feu-duty, in terms of section 8 of the Conveyancing (Scotland) Act, 1874.[3]

Stipulations as to buildings.

In a feu-charter, feu-contract, or a disposition there are very often conditions, positive or negative, about the erection of buildings on the lands disponed. These conditions may have as their object the giving of security for payment of the feu-duty, or the preservation of the amenity of the subjects. Clauses restricting the uses of property are strictly construed, the bias of the law being in favour of the freedom of ownership; but unambiguous words in such clauses will receive their full effect.[4] An important question in connection with building restrictions has often arisen as to whether a person who was not a party to the deed constituting them has an implied right or a *jus quæsitum* to enforce implement of them. On this matter an important case is *MacRitchie's Trustees* v. *Hislop*.[5] In that case a vassal (who was one of several holding of the same superiors) bound himself and his heirs and successors in a feu-contract "not to erect any other buildings upon the

[1] For form of clause, see Jur. Styles, vol. i., 22.
[2] Sturrock's Analysis, 55.
[3] 37 and 38 Vict., c. 94.
[4] For building restrictions, see Rankine on Land Ownership, 385 *et seq*
[5] 1879, 7 R., 384; rev. 1881, 8 R. (H.L.) 95.

said piece of ground except the tenement of houses and walls of enclosure already erected thereon, and if he or they shall build any offices upon the background, which they are at liberty to do, the same shall not exceed twelve feet in height in the side walls." A singular successor in the feu (Hislop) proceeded to build over a portion of a plot of ground in front of his office. Another of the feuars (Macritchie's Trustees), who by the feu-right under which they held were prohibited from erecting on their feu any other buildings except necessary offices, raised, with consent and concurrence of the common superiors, a suspension and interdict against Hislop's operations. The Second Division (Lord Young dissenting) held that the fact of the superior appearing in the face of the note as a consenter and concurrer gave the complainer a good title to sue the interdict, and accordingly granted the interdict craved. The case, however, went to the House of Lords, where the judgment of the Second Division was reversed. The House of Lords held—(1.) that the fact that there are several feuars of adjoining plots of building ground in the same street holding from a common superior does not, by itself, entitle any one of the feuars to insist on the observance of restrictions in the feu-rights of another; (2.) that to entitle one of such feuars so to insist there must be some mutuality and community of rights and obligations otherwise established between them; (3.) that such mutuality and community of rights and obligations can be established (*a.*) by express stipulation in their respective contracts with the superior, or (*b.*) by reasonable implication from some reference in the contracts to a common plan or scheme of building, or (*c.*) by mutual agreement between the feuars themselves; and (4.) that where the principal party to an action had no right or title whatever, the consent and concurrence of the party to whom alone such right or title belonged did not cure the defect of title in the principal party to the action. At delivering judgment, Lord Watson, after a reference to

those cases in which it had been held that each of a class of feuars had an implied right to enforce a common condition, said—"All of those appear to me to fall under one or other of two categories,—either (1.) where the superior feus out his land in separate lots for the erection of houses, in streets or squares, upon a uniform plan; or (2.) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions, which the feuar is taken bound to insert in all subfeus or dispositions to be granted by him." To the first of these categories he assigned *M'Gibbon* v. *Rankin*,[1] to the second *Robertson* v. *North British Railway Company*.[2] "The *ratio decidendi*," continued his Lordship, "in such cases as *M'Gibbon* v. *Rankin* seems to have been that a feuar who stipulates with his superior that a particular restriction shall be imposed upon all his fellow-feuars as well as upon himself, must intend that he shall have the power of enforcing it against them, and that they shall have the like power as in a question with him. In *Robertson* v. *North British Railway Company*, and similar cases, the principle of decision appears to me to have been that a subfeuar or disponee acquiring a building lot, subject to a particular condition, with notice in his titles that the common author, whether his immediate or over-superior, has imposed that condition upon the whole area of which his lot formed a part, must be taken as consenting that the condition shall be for mutual behoof of all the feuars or disponees within the area, and that all who have interest shall have a title to enforce it. In other words, the feuar is held as consenting to be bound by the law laid down by the common author for the benefit of all future feuars. I have been unable to find any decision proceeding upon the principle that a superior who feus out a portion of his estate to A under a precise restriction as to building, and who, in giving a title to A, neither undertakes, nor intimates an intention, to impose

[1] 1871, 1 Macph., 423. [2] 1874, 1 R., 1213.

similar restrictions in feuing the remainder of his ground, can thereafter confer upon every feuar who acquires a building lot in the vicinity a *jus quæsitum* enabling him to sue A directly."

Monopolies of superior's agents annulled.

By section 22 of the Conveyancing (Scotland) Act, 1874, conditions securing monopolies to a superior's agent, whether made before or after the commencement of the Act, are declared null. Section 24, however, provides that where superiors have agreed or contracted prior to the passing of the Act to feu land, but have not granted the feu-rights prior to the commencement of the Act, it is competent to stipulate that the same shall be recorded by the agent of the superior at the expense of the vassal, if such or a similar stipulation shall have been made and agreed to prior to the passing of the Act in the agreement or contract for feuing such lands.

Real burdens.

Real burdens are burdens which affect the lands themselves, and not the grantee and his heirs alone; they, as it has been said, run with the lands. A real burden, in the strictest sense of the expression, is a reserved money payment out of the lands contained in an original grant or deed of transmission of land, and it cannot be enforced by a personal action in the absence of an obligation for payment specially undertaken. In the absence of such obligation for payment, it is only enforceable against the lands by real diligence. But a real condition, as distinguished from a real burden in an original grant of lands, constitutes an integral part of such grant, and it can be enforced by personal action against the proprietor of the lands for the time being.[1] Notwithstanding the distinction which may be drawn between a real burden and a real condition, or an inherent condition of a grant of lands, and the different ways of enforcing them, the term "real burden" is in practice applied to both.

Essentials of a real burden for the payment of money.

It has now to be considered what are the essentials of a real burden,—of a real burden for the payment of money in

[1] See Lord Deas in *Marquis of Tweeddale's Trustees* v. *Earl of Haddington*, 1880, 7 R., 620.

an original grant or a disposition of lands held by feudal or burgage tenure. The essentials of such a real burden valid against singular successors are these :—

(1.) *The amount must be definite.*[1]

(2.) *The name of the creditor must be specified.*[2]

(3.) *The burden must be declared in words which clearly express or plainly imply that the lands themselves are to be affected by it, and not the grantee and his heirs alone.*[3] In the case of *Williamson* v. *Begg*,[4] Lord President Inglis expressed an opinion that neither a general disposition without a description of the lands conveyed, nor a notarial instrument following thereon in terms of schedule (L) of the Titles to Land Consolidation (Scotland) Act, 1868, can create a real burden on the lands.

(4.) *The burden must appear in the appropriate Register of Sasines.*[5]

Essentials of a real burden not for the payment of money.

The essentials of a real burden not for the payment of money are as follows :—

(1.) *It must be shown that a real burden or condition was intended to be constituted by the deed.* For example, there may be a reference to a plan in a charter, and it is often a question of construction whether the reference to the plan is merely for the purpose of identification, or whether it amounts to a condition of the grant.[6]

(2.) *Words must be used which clearly express or plainly imply that the lands themselves are to be affected, and not the grantee and his heirs alone.*[7] "If the condition is one usually attaching to the lands in a

[1] See *Tailors of Aberdeen* v. *Coutts*, Dec. 20, 1834, 13 S., 226, aff. 1 Rob. App., 296 ; and *Magistrates of Edinburgh* v. *Begg*, Dec. 20, 1883, 11 R., 352.

[2] Ersk. 2, 3, 50.

[3] Lord Corehouse in *Tailors of Aberdeen* v. *Coutts*, *supra*.

[4] 1887, 14 R., 720.

[5] Lord Corehouse in *Tailors of Aberdeen* v. *Coutts*, *supra* ; and see Lord Deas in *Stewart* v. *Duke of Montrose*, 1860, 22 D., 755, aff. 4 Macq., 499.

[6] See Rankine on Land Ownership, 387, and authorities there cited.

[7] *Tailors of Aberdeen* v. *Coutts*, *supra*.

feudal or burgage holding," said Lord Corehouse in the case of the *Tailors of Aberdeen*, "in particular if it has a *tractus futuri temporis*, or is of a continuous nature which cannot be performed, and so extinguished, by an act of the disponee or his heir, words less clear and specific will suffice to create it than when the burden appears to be of a personal nature,—for example, the payment of a sum of money once for all in terms of a family settlement."

(3.) *The words constituting the real burden or condition must appear in the appropriate Register of Sasines.*[1]

(4.) *The burden or condition must not be* (a) *contrary to law;* or (b) *inconsistent with the nature of the species of the property disponed;* or (c) *useless or vexatious;* or (d) *contrary to public policy.*[2]

(5.) *The superior, or the party in whose favour it is conceived, must have an interest to enforce it.*[3] When a superior raises an action to enforce a condition imposed by himself or his author, the *onus* lies on the vassal of proving that, owing to some change of circumstances, any legitimate interest which the superior may originally have had to enforce it has ceased to exist,[4] but a vassal in right of a common condition with an adjoining vassal cannot enforce such condition without proving a distinct patrimonial interest for doing so.[5]

If the essentials mentioned above concur, it is not necessary in the constitution of a real burden or condition that any *voces signatæ* or technical form of words should be employed; and it is not necessary to have a declaration that the obligation is real, or that it is a *debitum fundi*, or that it

[1] Lord Corehouse in *Tailors of Aberdeen* v. *Coutts*, *supra*.
[2] *Ibid.*
[3] *Ibid.*
[4] *Earl of Zetland* v. *Hislop*, March 18, 1881, 8 R., 675; rev. 1882, 9 R. (H.L.), 40.
[5] *Gould* v. *M'Corquodale*, Nov. 24, 1869, 8 Macph., 165; *Dennistoun* v. *Thomson*, Nov. 22, 1872, 11 Macph., 121; and see *MacRitchie's Trustees* v. *Hislop*, Dec. 17, 1879, 7 R., 384, rev. 1881, 8 R. (H.L.), 95.

shall be inserted in future infeftments, or that it shall attach to singular successors, or to fence the obligation with an irritant clause, and far less with irritant and resolutive clauses. If a burden is clearly personal, or exposed to objections, an irritant clause will not make it real; but an irritant clause may afford the means of construing a condition, and the presence of such a clause may be one reason for presuming, in the construction of a condition which is ambiguous in its terms, that the granter of the deed in which the condition occurs meant it to apply not only to the grantee and his heirs, but also to singular successors. Besides, a superior in feudal subjects or the disponer of burgage lands in right of a real burden or condition fenced with an irritant clause has a powerful remedy in case of contravention, for he can raise an action of declarator to have it found that, in respect of the contravention and the irritant clause, the right of the proprietor in possession is at an end.[1] But burdens which are *inter naturalia* of a feu,—*i.e.*, inherent conditions of a feudal grant—do not require to be declared real, or to appear in the infeftment. Such conditions run with the lands, and are perpetual qualifications affecting both the original superior and vassal, and their respective heirs and singular successors.[2]

It is necessary to add that the rules which have been stated with regard to real burdens or real conditions valid in law against singular successors apply only when infeftment has once been taken. So long as no infeftment has been taken on the deed imposing burdens, an assignee must take the personal title subject to the burdens which were binding on the original disponee.

Real burdens can be imported by reference in statutory form.

Instead of setting forth particularly the real burdens or real conditions effeiring to lands in a conveyance thereof, it is competent to import them into the conveyance by reference

[1] See Lord Corehouse in *Tailors of Aberdeen* v. *Coutts*.

[2] Ersk. 2, 3, 11; and see *Stewart* v. *Duke of Montrose*, *supra*; *Hope* v. *Hope*, 1864, 2 Macph., 670.

in statutory form. Before noticing the existing provisions as to insertion of real burdens or conditions by reference, it may be well to show the prior enactments regarding the subject.

Repealed enactments as to importing burdens by reference.

(1.) From and after 30th September 1847,[1] it was made competent by the Lands Transference Act, 1847, in all cases where lands or heritages not held by burgage tenure were then or should thereafter be held under any real burdens or conditions or limitations whatsoever, appointed to be fully inserted in the investitures of such lands, to omit the full insertion of real burdens, &c. in dispositions and conveyances of such lands, procuratories, charters, precepts of *clare constat*, decrees of adjudication, instruments of sasine, and other deeds and instruments of what nature soever necessary to transmit, renew, or complete the feudal title thereto, provided that they were specially referred to as set forth at full length in the recorded instrument of sasine wherein they were first inserted, or in any recorded instrument of sasine of subsequent date forming part of the progress of titles of the lands, such reference being made in the terms or as nearly as might be in the terms set forth in schedule (C) of the Act.[2]

(2.) From and after 30th September 1847[3] it was made competent by the Lands Transference Burgage Act, 1847, in all cases where lands held burgage were or should thereafter be held under any real burdens, or conditions, or limitations whatsoever appointed to be fully inserted in the investitures of such lands, to omit the full insertion of real burdens, &c. in dispositions and conveyances of such lands, decrees of adjudication, instruments of resignation and sasine, instruments of cognition and sasine, and other deeds and instruments of what nature

[1] 10 and 11 Vict., c. 48, sect. 23.
[2] *Ibid.*, sect. 5.
[3] 10 and 11 Vict., c. 49, sect. 13.

soever necessary to transmit, renew, or complete the feudal title thereto, provided they were specially referred to as set forth at full length in the recorded instrument of resignation and sasine in which the same were first inserted, or in any recorded instrument of resignation and sasine, or of cognition and sasine, of subsequent date, and forming part of the progress of titles of the lands, such reference being made in the terms or as nearly as might be in the terms set forth in schedule (C) of the Act.[1]

(3.) From and after 30th September 1847[2] it was made competent by the Heritable Securities Act, 1847, in the case of bonds and dispositions in security granted in terms of the Act, notwithstanding any declaration to the contrary contained or to be contained in the rights and title-deeds of the lands embraced by the security, instead of inserting at full length any conditions, reservations, restrictions, and provisions under which the lands and other heritages were held, to make reference to the same as set forth at full length in the recorded instrument, whether of sasine or resignation *ad remanentiam*, in which the same were first inserted, or any other recorded instrument of sasine forming a part of the investiture of the granter of such security in the lands, and which contained such conditions, reservations, restrictions, and provisions at full length, such recorded instrument being described by the name of the person in whose favour the same was expede, the Register of Sasines in which the same was recorded, and the date of recording the same.[3]

(4.) From and after 1st October 1847[4] it was made competent by the Crown Charters Act, 1847, in all cases

[1] 10 and 11 Vict., c. 49, sect 4.
[2] 10 and 11 Vict., c. 50, sect. 1.
[3] 10 and 11 Vict., c. 50, sect. 4.
[4] 10 and 11 Vict., c. 51, sect. 1.

where lands then were or should thereafter be held under any real burdens, or conditions, or limitations whatsoever, appointed to be fully inserted in the investitures of such lands, to omit from Crown charters and precepts containing such lands, and the instruments of sasine following on such charters and precepts respectively, the full insertion of such real burdens, &c., provided that they were specially referred to as set forth at full length in the recorded instrument, whether of sasine or of resignation *ad remanentiam*, wherein the same were first inserted, or in any recorded instrument of sasine of subsequent date forming part of the progress of titles of such lands, such reference being made in the terms or as nearly as might be in the terms directed in schedule (C) of the Act.[1]

(5.) From and after 15th November 1847[2] it was competent by the Service of Heirs Act, 1847, in all cases of special service where the lands were held under any real burdens, or conditions, or limitations whatsoever appointed to be fully inserted in the investiture of such lands, to omit in the petition of service, and in the decree of service to follow thereon, and in the precepts, sasines, or other instruments necessary to complete the investiture following on such decree, the full insertion of such real burdens, &c., provided they should be therein specially and directly referred to as set forth at full length in the recorded instrument of sasine in favour of the deceased person served to, or as set forth at full length in the recorded instrument of sasine or of resignation *ad remanentiam* of the lands in which they were first inserted, or in any other intermediate recorded instrument of sasine, such reference being made in

[1] 10 and 11 Vict., c. 51, sect. 27. [2] 10 and 11 Vict., c. 47, sect. 6.

the form or as nearly as might be the form shown in schedule (B) of the Act.[1]

(6.) By the five preceding enactments reference was required to be made to the real burdens as set forth at full length in a duly recorded instrument forming part of the progress of titles; but from and after 1st October 1860 it was made lawful by the Titles to Land Burgage (Scotland) Act, 1860, to make reference to the real burdens, &c. as set forth at full length in any conveyance or notarial instrument recorded in the appropriate Register of Sasines to which such real burdens, &c. applied.[2]

Enactments of Titles to Land Consolidation Act, 1868, as to importing real burdens by reference.

The enactments of the six statutes just cited were repealed, and with slight alterations re-enacted, by section 10 of the Titles to Land Consolidation (Scotland) Act, 1868.[3] That section is as follows:—

"Where lands are or shall hereafter be held under any real burdens or conditions or provisions or limitations whatsoever appointed to be fully inserted in the investitures of such lands, it shall, notwithstanding such appointment, and notwithstanding any law or practice to the contrary, not be necessary in any conveyance or deed of or relating to such lands to insert such real burdens or conditions or provisions or limitations, provided the same shall, in such conveyance or deed, be specially referred to as set forth at full length in the conveyance or deed of or relating to such lands, recorded in the appropriate Register of Sasines, wherein the same were first inserted, or in any such conveyance or deed of subsequent date recorded as aforesaid, and forming part of the progress of titles of the said lands, such reference being made in the terms or as nearly as may be in the terms set forth in schedule (D) hereto annexed; and the reference to such real burdens or conditions or provisions or limitations, if so made in any such conveyance or deed, whether dated prior or subsequent to the commencement of this Act, shall be held to be equivalent to the full insertion thereof, and shall, to all intents and in all questions whatever, whether with the disponer or superior or third parties, have the same legal effect as if the same had been inserted exactly as they are expressed in the recorded conveyance or deed referred to, notwithstanding any law or practice or Act or Acts of Parliament to the contrary."

Schedule (D) is in these words:—

"[*After the description of the lands, instead of inserting the burdens, &c. at length, these may be referred to as follows, viz.:*] but

[1] 10 and 11 Vict., c. 47, sect. 5.
[2] 23 and 24 Vict., c. 143, sect. 31.
[3] 31 and 32 Vict., c. 101.

always with and under the real burdens, conditions, provisions, and limitations [*or such of these as may apply or have reference to the case*] specified in a deed [*or* instrument, *here specify a deed or conveyance in which the burdens, &c. were first inserted, or any subsequent deed or conveyance in which they are inserted, forming part of the progress of the titles to the lands*] recorded [*specify Register of Sasines, or, if the deed or conveyance as recorded has been previously referred to, say* in the said deed [*or* instrument] recorded as aforesaid] on the day of in the year .

"[*And in subsequent clauses in which it is requisite or usual to refer again to the burdens, &c., the reference may be made thus :*] but always with and under the real burdens, conditions, provisions, and limitations [*or such of these as may apply or have reference to the case*] before referred to."

Enactments of Conveyancing Act, 1874, as to importing real burdens by reference.

It will be noticed that, while it was made competent by the Titles to Land Consolidation (Scotland) Act, 1868, to refer in statutory form to real burdens, conditions, &c. in a deed dealing with the lands held under such burdens, conditions, &c., instead of inserting them *ad longum*, the Conveyancing (Scotland) Act, 1874,[1] first authorised reservations, real burdens, &c. to be imported by reference into feu-charters or other original grants. In other words, prior to this Act it was considered necessary to insert in an original conveyance of land, such as a feu-charter or a feu-contract, the real burdens of the grant *ad longum*, although it was competent in subsequent deeds of transmission of the land to refer to them in virtue of the provisions of the prior statutes which have been referred to above. Section 32 of the Conveyancing (Scotland) Act, 1874, however, enacts (1) that real burdens, &c. affecting lands may be imported into *any* deed (including original grants of land) relating to such lands by reference to a duly recorded deed applicable to such lands, or to the estate of which such lands form a part, in which the real burdens, &c. are set forth at length ; and (2) that a proprietor may record in the Register of Sasines appropriate to his lands a deed setting forth real burdens, &c., under which he is to feu, or otherwise deal with or affect his lands, or any part thereof, and that the same may be imported, in whole or in part, by reference into any deeds, including original grants as

[1] 37 and 38 Vict., c. 94, sect. 32.

well as deeds of transmission relating to the lands. Section 32 is as follows:—

> "Reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations affecting land may be validly and effectually imported into any deed, instrument, or writing relating to such lands by reference to a deed, instrument, or writing applicable to such lands, or to the estate of which such lands form a part, recorded in the appropriate Register of Sasines, and in which such reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations are set forth at full length, and a reference in the form set forth in schedule H hereto annexed, or in a similar form, shall be sufficient. And it shall be lawful for any proprietor of lands to execute a deed, instrument, or writing, setting forth the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations under which he is to feu or otherwise deal with or affect his lands, or any part thereof, and to record the same in the appropriate Register of Sasines; and the same being so recorded, such reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations may be effectually imported in whole or in part by reference into any deed or conveyance relating to such lands subsequently granted by such proprietor, or by his heir or successor, or by any person whatsoever, provided it is expressly stated in such deed or conveyance that it is granted under the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations set forth in such deed, instrument, or writing."

Schedule H runs thus:—

> "The reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations [*or as the case may be*] specified in [*refer to the deed, instrument, or writing in such terms as shall be sufficient to identify it, and specify the register in which it is recorded, and the date of registration, or where the deed, instrument, or writing referred to is recorded on the same date as the deed, instrument, or writing containing the reference, here say,* recorded of even date with the recording of these presents]."

III. Term of Entry.—Before 1847 the term of entry was ascertained from the clause of assignation of rents. Since then the statutory form of the clause of entry has been—"With entry at the term of ."[1] The date of entry ought always to be set forth;[2] but if it is not, it will be determined in accordance with the provisions of section 28 of the Conveyancing (Scotland) Act, 1874,[3] which enacts:—

[1] 31 and 32 Vict., c. 101, sect. 5, and schedule (B), No. 1.

[2] Begg's Conveyancing Code, 364; Sturrock's Analysis, 99; Bell's Lect., vol. i., 651.

[3] 37 and 38 Vict., c. 94, sect. 28.

> "Where no term of entry is stated in a conveyance of lands, the entry shall be at the first term of Whitsunday or Martinmas after the date or last date of the conveyance, unless it shall appear from the terms of the conveyance that another term of entry was intended."

In a contract of sale of heritable subjects the term "immediate entry" means merely such early possession as is possible and practicable in the circumstances.[1]

IV. TENENDAS.—The object of this clause is (1) to point out the superior of whom the lands disponed are to be held, and (2) to specify the tenure by which the lands are to be held.[2] The holding under an original grant is, and has always been, a holding *de me*, or a holding, as Menzies says,[3] permanently subordinate to the granter and his successors. Originally, in addition to expressing the kind of holding, the *tenendas* clause contained a list of accessories, privileges, and servitudes which pass *sub silentio* as pertinents of the grant and also the destination to heirs.[4] The part of the *tenendas* containing the destination to heirs was called the *habendum*. The specification of accessory rights was continued in charters from the Crown until the commencement of the Crown Charters Act, 1847,[5] but long before that year it had been omitted from charters by subject-superiors,[6] in respect that it was superfluous, the extent of the grant being governed by the dispositive clause, and parts and pertinents being carried without enumeration.[7] Whilst the *tenendas* is not a conveying clause, it may in some cases raise a presumption in favour of the disponee, so as to entitle him to establish a right by evidence of possession.[8] IV. *Tenendas.*

V. REDDENDO.—This clause specifies the payments or other prestations to be made by the vassal to his superior. In feus V. *Reddendo.*

[1] *Heys* v. *Kimball and Morton*, 1890, 17 R., 381.

[2] Bell's Lect., vol. i., 632; Menzies, 550.

[3] Menzies, 551.

[4] Ross' Lect., vol. ii., 166; Ersk. 2, 6, 6 *et seq.*; Bell's Lect., vol. i., 632; Menzies, 550.

[5] 10 and 11 Vict., c. 51.

[6] Bell's Lect., vol. i., 632; Menzies, 550.

[7] See *Earl of Aboyne* v. *Farquharson*, Nov. 16, 1814, F.C., aff. 1818, 6 Pat. App., 380.

[8] See Lord Colonsay in *Lord Advocate* v. *Sinclair*, 3 Macph., 981; aff. June 7, 1867, 5 Macph. (H.L.), 97; and see *Lord Advocate* v. *M'Culloch*, 1874, 2 R., 27.

Feu-duty since 1874 must be of fixed amount or quantity.

granted after the commencement of the Conveyancing (Scotland) Act, 1874,[1] the annual feu-duty must be of fixed amount or quantity; but it is lawful to condition or stipulate for a permanent increase or reduction of the feu-duty, provided (*a*) that the amount of such increase or reduction is certain, and (*b*) that the time or times from and after which such increase or reduction is to have effect are also certain, and not dependent upon any event or occurrence except the occurrence or recurrence of the time or times at which, under the terms of such conditions or stipulations, the increase or reduction is to have effect. In feus granted after the commencement of the Conveyancing (Scotland) Act, 1874, no casualties or duties are by law, irrespective of express condition or covenant, payable to the granter of the feu or his successors in the superiority; and, whilst it is not lawful to condition or stipulate for any casualty to be paid on the succession of an heir or the acquisition of a singular successor, it is lawful to condition or stipulate for payment of a casualty in the form of a periodical fixed sum or quantity, provided (*a*) that such periodical additional sum or quantity is certain, and (*b*) that the time or times at which such additional sum or quantity shall be exigible are also certain, and not dependent upon any event or occurrence except the occurrence or recurrence of the time or times at which, under the terms of such conditions or stipulations, the periodical sum or quantity is made exigible. In consequence of the provisions of section 23, it is not uncommon in practice for superiors to stipulate in feu-rights for payment of a duplicand of the feu-duty payable at the end of a certain number of years, and such a stipulation comes after the usual *reddendo* for feu-duty.[2] But[3] in all cases where superiors have agreed prior to the passing[4] of the Act to feu land, but have not granted the feu-rights prior to the commencement[5] thereof, it is competent in such feu-rights to

No casualties in feus created after 1874.

Where feu-rights stipulating or inferring casualties contracted to be granted before 1874.

[1] 37 and 38 Vict., c. 94, sect. 23.
[2] See Jur. Styles, vol. i., 28.
[3] 37 and 38 Vict., c. 94, sect. 24.
[4] 7th August 1874.
[5] 1st October 1874.

stipulate for payment of the casualties which the vassals may expressly or by force of law have agreed to, in the same manner as they might have done prior to the commencement of the Act; but instead of such stipulation regarding casualties in the feu-rights, it is in the option of either superiors or vassals to have such casualties converted into annual sums equal to four per cent. on the amount of the price of the redemption thereof, ascertained as provided in section 15[1] of the Act, and these annual sums are to be deemed feu-duties with all the legal qualities thereof.

Feu-duty before 1874.

Before the passing of the Conveyancing (Scotland) Act, 1874, parties to feu-rights could stipulate for payment of feu-duties almost in any way agreeable to them. It was not then essential, as it is now, that they should be of fixed amount or quantity. In feu-rights, however, granted for many years before 1874 the *reddendo* usually was for a payment in money or grain. By the Clan Act[2] *quasi*-military services, such as hosting, hunting, watching, and warding, were abolished. The Act, however, did not make it incompetent to stipulate in a feu grant for the rendering of services which were not military or *quasi*-military in their nature. Accordingly a vassal was held bound to implement an obligation to uphold a boat of six oars, and to provide it with six rowers and a steersman, for the use of the superior and his family, and to keep the mansion-house wind and water-tight,[3] and another vassal was held bound by an obligation to deliver a certain quantity of peats at a particular castle, although it had fallen into ruins, and although there were no mosses yielding peats on the vassal's lands.[4] In feus in which the performance of agricultural services and carriages are stipulated for, the law is that these are exigible only if demanded within the year.[5] Arrears of payment in

[1] See p. 93.

[2] 1 Geo. I., statute 2, c. 54, sects. 10, 11, and 12.

[3] *Duke of Argyle* v. *Creditors of Tarbert*, 1762, M. 14,495.

[4] *Monro* v. *M'Kenzie*, 1763, M. 14,497.

[5] *Young, &c.* v. *Bruce*, Dec. 7, 1693, M. 13,071; Duff's Feudal Conveyancing, 83.

kind may be exacted, however, at any time within the years of prescription, and such arrears are payable either in kind or at the market prices of the several years in which they fall due.[1] "The superior," says Professor George Joseph Bell,[2] "cannot restrain the feuar from growing other grain than that stipulated for the feu-duty; but he is entitled, under a general stipulation of grain or victual feu-duty, to demand *in kind* such grain as the vassal grows on the land, although more valuable than the sort of grain cultivated at the date of the charter. If the feu-duty be payable in produce no longer to be found on the land (as peats, or coal, or lime, which have been exhausted), the obligation is not by such exhaustion extinguished, unless there shall be an express specification of 'such as are produced on the land.'" Interest is not due on feu-duty *ex lege*, but it may be, and now invariably is, stipulated for; and apart from stipulation, it runs from the date of a judicial demand for payment.[3]

Commutation of carriages and services under feu-rights.

By sections 20 and 21 of the Conveyancing (Scotland) Act, 1874,[4] the power of commutation of carriages and services stipulated for under feu-rights has been conferred on the superior or the vassal. These sections provide:—

> (1.) Where carriages and services, or any of them, exigible by the superior shall for any period of five years have been commuted to an annual money payment by agreement between the parties, whether reduced to writing or not, and whether express or implied from the conduct or actings of parties, and have not thereafter been exacted or performed, said annual payment shall thereafter be deemed to be the value in all time coming of such carriages and services respectively, and the superior shall be bound to accept the same.[5]

[1] *Duke of Hamilton* v. *Mather*, 1835, 14 S., 162, aff. May 1837, 2 S. and M'L. App., 586; and see *Hope* v. *Aitken*, 1872, 10 Macph., 347.

[2] Bell's Prin., 694.

[3] *Tweeddale* v. *Aytoun*, 1842, 4 D., 862; *Tweeddale's Trustees* v. *Haddington*, Feb. 25, 1880, 7 R., 620.

[4] 37 and 38 Vict., c. 94, sects. 20, 21.

[5] Sect. 20.

(2.) With respect to carriages and services which have not been so commuted, it shall be competent to either party to apply to the sheriff within whose jurisdiction the lands lie to determine summarily the annual value thereof, and the determination of the sheriff shall be final and not subject to review, and the superior shall be bound thereafter to accept of the annual sum so determined.[1]

(3.) The annual money value, where ascertained by agreement, may be stated in the memorandum in the form set forth in schedule G[2] annexed to the Act, or in a similar form, signed by the parties or their respective agents; and on such memorandum, or the extract decree pronounced by the sheriff, as the case may be, being recorded in the appropriate register of sasines, such annual money value shall be deemed to be feu-duty, with all the legal qualities thereof, and shall form an addition to any existing feu-duty, and the superior's right to the carriages and services shall be held to be discharged.[3]

(4.) Such discharge and commutation may be validly effected, notwithstanding the fetters of any entail.[4]

Nature of feu-duty.

The feu-duty is a real and preferable burden—a *debitum fundi*—and a vassal can only give a right to the lands subject to the feu-duty. By means of his real right in the lands the superior has a preference over purchasers in sales, voluntary or judicial, and in rankings of creditors, and this preference extends over the whole lands disponed in feu, however divided by subinfeudation or by sales.[5] To preserve this preference, the feu-duty, being a real burden *inter naturalia* of the grant, does not require to enter the record, and in this way it differs entirely from an ordinary real burden.[6]

[1] Sect. 20.
[2] Sect. 21.
[3] Sect. 21.
[4] Sect. 21. On sections 20 and 21, see Mowbray's Analysis, 20; Begg's Conveyancing Code, 352; Sturrock's Analysis, 83.
[5] See Bell's Prin., sect. 697, and authorities there cited.
[6] See Bell's Lect., vol. ii., 1156.

Means of recovering feu-duty.

A superior has various methods for compelling payment of feu-duty:—

(1.) Personal action.

1. *Personal Action.*—The vassal after accepting a feu cannot renounce it *invito superiore*, even as regards future feu-duties.[1] By his acceptance of it he makes himself personally liable for payment of the feu-duties and performance of the whole obligations of the feu, and to enforce this liability the superior can raise a personal action against him.

When vassal's liability for feu-duty ceases.

When the vassal in a feu grant is bound in the ordinary way—that is, when he and his heirs and assignees are bound to make payment of the feu-duty—his liability for payment ceased under the law as it stood prior to the Conveyancing (Scotland) Act, 1874, on the entry *habili modo* of his disponee, onerous or gratuitous, with the superior whose title had to be duly completed.[2] But by that Act infeftment implies entry with the nearest superior whose estate of superiority would, according to the law existing prior to the commencement of the Act, have been not defeasible at the will of the proprietor so infeft,[3] and that whether the superior's own title or the title of any over-superior has been completed or not. The implied entry of a disponee, however, does not *per se* relieve the last-entered vassal in a question with the superior, of liability for the feu-duty. To relieve the last-entered vassal, bound in the ordinary way in a feu-right, there require to be under section 4 (2) of the Act (*a*) the implied entry of his disponee; and (*b*) notice of change of ownership to the superior.

It will be noticed that under section 4 (2) the proprietor last entered is personally liable to the

[1] *Hunter* v. *Boog*, 1834, 13 S., 205.

[2] *Hyslop* v. *Shaw*, 1863, 1 Macph., 535.

[3] 37 and 38 Vict., c. 94, sect. 4 (2).

superior alike for payment of the whole feu-duties affecting the land and for performance of the whole obligations of the feu until his liability is effectually removed. This liability, however, is without prejudice to the right of the proprietor last entered in the lands to recover from the entered proprietor of the lands all feu-duties which he may have had to pay in consequence of any failure or omission to give notice of change of ownership; and for this purpose all the remedies competent to the superior for recovery of feu-duties are, by virtue of the Act, held to be assigned to the proprietor last entered in the lands to the effect of enabling him to recover payment of any sums so paid by him.[1] An entry by a superior to a disponee implied, in the absence of stipulation or reservation to the contrary, a discharge of all bygone feu-duties and casualties;[2] and to prevent an implied entry under the Conveyancing (Scotland) Act, 1874, from operating as such a discharge section 4 (3) enacts:—

Implied entry does not affect superior's rights to feu-duties or casualties.

> "Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice or under the conditions of any feu-right, for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but provided always, that such implied entry shall not entitle any superior to demand any casualty sooner than he could, by the law prior to this Act or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering."[3]

[1] On section 4 (2) see Mowbray's Analysis, 5 *et seq.*; Begg's Conveyancing Code, 306 *et seq.*; Sturrock's Analysis, 22 *et seq.*

[2] *Tailors of Glasgow* v. *Blackie*, 1851, 13 D., 1073; *Lord Advocate* v. *Lord Rollo*, 1872, 10 Macph., 1024.

[3] See Mowbray's Analysis, 11; Begg's Conveyancing Code, 314; Sturrock's Analysis, 27.

Heirs and executors not liable for feu-duty after vassal's death, if estate not taken up.

It is to be noted, however, that the estate of a vassal who is bound for feu-duty in the ordinary way under a feu-right is not liable for feu-duties accruing after the date of the vassal's death. Thus, in the recent case of *Aiton* v. *Russell's Executors*,[1] a vassal in a feu-contract bound and obliged "himself and his heirs, executors, and successors whomsoever," to make payment of £117 : 15s. in name of feu-duty at Martinmas in each year. In April 1887 the vassal died, and his heir declined to take up the feu. The superior thereupon raised an action for the feu-duty for the year preceding Martinmas 1887, and for damages for breach of contract for failure to take up the feu on the vassal's heir declining to do so. The executors tendered the feu-duty so far as it had accrued up to the day of the deceased's death, and the Court held (1) that there was no obligation upon the executors to pay feu-duties accruing after the date of the vassal's death, and (2) that they were not liable in damages for breach of contract. But in a feu-right a vassal may so bind himself and his representatives as to render him and his estate, notwithstanding a transmission of the feu, liable in perpetuity for payment of the feu-duty to the superior. If he in a feu-right binds himself, his executors and successors, conjunctly and severally, to pay the feu-duty,[2] or if he grants, in addition to an obligation in ordinary form for payment in a feu-right, a separate personal bond binding himself and his representatives, whether conjunctly and severally or not, for payment of the feu-duty,[3] he

[1] 1889, 16 R., 625.

[2] *Police Commissioners of Dundee* v. *Straton*, 1884, 11 R., 586 (a case of a feu-contract); and see remarks on this case in *Aiton* v. *Russell's Executors, supra*; *Small* v. *Miller*, 1849, 11 D., 495, rev. 1853, 1 Macq. App., 345; *Burns* v. *Martin*, 1885, 12 R., 1343, rev. 1887, 14 R. (H.L.), 20.

[3] *King's College of Aberdeen* v. *Lady James Hay*, 1852, 14 D., 675, rev. 1854, 1 Macq. App., 526; *Brown's Trustees* v. *Webster*, 1852, 14 D., 680, rev. 1855, 2 Macq. App., 40.

and his estate remain liable to the superior in perpetuity for the feu-duty. Further, a superior can raise a personal action for the feu-duty due to him by his own vassal against sub-vassals for the amount of their subfeu-duties,[1] and perhaps, if the obligations come under by them to their own superior are not proportional to the portion of the original subject subfeued to them, as compared with the original *cumulo* feu-duty, for an amount of the *cumulo* feu-duty which corresponds to the extent of the subfeu.[2] The case of *Sandeman* v. *Scottish Property Investment Company, Limited*, however, settles that an over-superior has not a direct personal action for the whole *cumulo* feu-duty against a sub-vassal holding part of the feu when the subfeu-duty is less in amount than the *cumulo* feu-duty. It is the law that a superior has a hypothec for recovery of his feu-duties, not only over the produce and stocking of agricultural and pastoral subjects, but also over *invecta et illata*, and that where the subjects are let, the superior prevails on the ground that the landlord cannot let his land otherwise than under burden of the feu-duties.[3] But the superior, in respect of the hypothec, does not resort to sequestration of the tenant's effects; he can raise a personal action or an action of poinding of the ground against the tenant in respect of unpaid rents. Referring to the personal action, Professor George Joseph Bell states[4] that a superior can raise a personal action for feu-duty due to him "against tenants in the lands while in possession, or intromitters with the fruits during

Personal action against sub-feuars.

Superior's hypothec for feu-duty.

[1] See *Sandeman* v. *Scottish Property Investment Company Building Society, Limited*, 1881, 8 R., 790; *Hyslop* v. *Shaw*, 1863, 1 Macph., 535; *Marquis of Tweeddale's Trustees* v. *Earl of Haddington*, 1880, 7 R., 620.

[2] See Lord President Inglis in *Sandeman*, 8 R., 794 (*ad fin*).

[3] See Rankine on Leases, p. 340.

[4] Prin., sect. 700.

their intromission." Dealing with the words quoted from Bell, Lord Rutherfurd Clark, in the case of the *Prudential Assurance Company* (*Limited*) v. *Cheyne*,[1] observed that Bell "does not say that the superior has a personal action against tenants for their rents. He says no more than that the superior has a personal action against them. No doubt he has, for they are intromitters, but his action must, I think, be founded on the intromission, not on the contract of lease." An intromitter is not liable for feu-duties which have accrued due prior to the time when he entered into possession.[2] In a question with the superior, a person—for example, the proprietor last entered in the lands prior to notice of change of ownership of the feu, or an intromitter with the fruits of the lands—may be liable for the feu-duty, but he may have relief against the party liable for it in the last resort. As already stated, the proprietor last entered, who has paid feu-duty for a vassal impliedly entered, in respect of no change of ownership, has, by section 4 (2) of the Conveyancing (Scotland) Act, 1874, the remedies competent to the superior for enforcing relief for feu-duty so paid. But parties who pay feu-duty for another, and who are not in a position to found on section 4 (2), whilst they are entitled to relief at common law, are not entitled to an assignation from the superior of his remedies for enforcing payment, which would have the effect of allowing the feu-duty paid to remain a charge on the feu. Thus, in *Guthrie and M'Conachy* v. *Smith*,[3] a third party tendered payment of feu-duty due by a vassal, and

[1] 1884, 11 R., 871.

[2] *Rollo* v. *Murray*, 1629, M. 4185; *Cockburn* v. *Trotters*, 1639, M. 4187; *Biggar* v. *Scott*, 1738, M. 4191; and see Lord Rutherfurd Clark's remarks in *Prudential Assurance Company* (*Limited*), cited *supra*, and Rankine on Leases, 341.

[3] 1880, 8 R., 107.

accompanied the tender with a demand for an assignation in his favour not only of the personal debt due by the vassal, but also of the rights which the superior had for enforcing payment of that debt, but under reservation of and without prejudice to the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to her. The superior refused to grant the special assignation craved, and the Court held that the party so tendering, or a vassal himself in tendering payment of his feu-duty, is not entitled to require from the superior an assignation of his rights to enable the party paying to recover the proportion of feu-duty applicable to part of a feu he had disponed, although the assignation asked contained a declaration to the effect that it should not prejudice the rights of the superior. The ground of the judgment was that, however the assignation might be expressed, it might prejudicially affect the superior in recovering future feu-duties.

2. *Declarator of irritancy* ob non solutum canonem.— This remedy has already been dealt with.[1] Whilst the law is that the vassal has a right to retain feu-duties so long as an essential condition of the feu remains unperformed by the superior,[2] it is not a valid defence to an action of declarator of irritancy *ob non solutum canonem* that there is a dispute between the superior and the vassal as to the vassal's right to erect certain buildings.[3] (2.) Declarator of irritancy *ob non solutum canonem.*

3. *Action of poinding of the ground.*—The superior can poind the moveables on the lands, whether the property of the debtor or his tenants, for the feu-duties, (3.) Poinding of the ground.

[1] See p. 60, *supra.*

[2] See Bell's Prin., 702, and authorities there cited.

[3] *Thom* v. *Chalmers*, 1886, 13 R., 1026.

or for relief, or for a taxed composition due to him ;[1] but the moveables of tenants are only liable to the extent of their rents due and unpaid.[2] Unlike an heritable creditor, who can use the remedy of poinding the ground, or that of maills and duties, or both, a superior cannot resort to an action of maills and duties for payment of feu-duties on the ground that the superior has no right to possession, being excluded therefrom by his own grant.[3] As poinding of the ground cannot be exercised by one having no real right in the land, a *quondam* superior who had parted with his right to the land was held to have no title to poind the ground for arrears of feu-duty.[4]

Casualties of grant created before 1874.

The casualties of a grant of land held by feu or blench tenure prior to the commencement of the Conveyancing (Scotland) Act, 1874, were — (1) relief; (2) composition; (3) non-entry; and (4) liferent escheat. As will be shown in the sequel, non-entry resolved itself into a way of forcing a disponee of land to enter as a vassal; and by the Conveyancing (Scotland) Act, 1874, it was abolished, and an action of declarator and for payment of a casualty introduced in place of the action of declarator of non-entry.[5] Liferent escheat does not appear to be affected by the Conveyancing (Scotland) Act, 1874,[6] and is therefore a casualty due under old as well as new grants of land held by feu or blench tenure.

Relief.

The casualty of relief and that of composition are not due under feu-rights created after 1st October 1874, but under feu-rights created prior to that date they are still exigible. Relief was the sum payable before 1874 by an heir of the

[1] See *Morrison's Trustees* v. *Webster*, 1878, 5 R., 800; *Stewart* v. *Gibson's Trustees*, 1880, 8 R., 270; *Marquis of Tweeddale's Trustees* v. *Earl of Haddington*, 1880, 7 R., 620.

[2] *Brown* v. *Scott*, 1859, 22 D., 273.

[3] *Prudential Assurance Company (Limited)* v. *Cheyne*, 1884, 11 R., 871.

[4] *Scottish Heritages Company* v. *North British Property Investment Company*, 1885, 12 R., 550. On poinding of the ground by superior, see Bell's Prin., 699; Mackay's Court of Session Practice, vol. ii., 311.

[5] 37 and 38 Vict., c. 94, sect. 4 (4).

[6] See for scope of term "casualties" in Act, sect. 3.

last vassal on his entry with the superior, and is now the sum exigible under feu-rights created before 1st October 1874, on the death of the last expressly entered vassal—*i.e.*, the vassal who has entered according to the old law, or who has paid a casualty since 1st October 1874—from his heir, if he takes up the lands. It amounted before 1874, and amounts now, to one year's feu or blench duty over and above the duty due for the year in which it was or is exigible. Composition, on the other hand, was, in the absence of special stipulation to the contrary, the sum exigible before 1874 from a singular successor in lands on his entry with the superior, and is now the sum exigible under feu-rights created before 1st October 1874 on the death of the last expressly entered vassal from a singular successor in the lands. It amounted before 1874, and amounts now, to a year's rent of the lands, or, if they are in the singular successor's own possession, to the sum for which they might be let[1] under these deductions:— Composition.

(1.) *The annual feu or blench duty.*
(2.) *All public burdens (including minister's stipend, unless a deduction is made, as after stated, in respect of teinds).*
(3.) *All annual burdens imposed with the superior's consent.*
(4.) *All reasonable repairs to houses or other perishable subjects.*[2]
(5.) *When the vassal does not hold the teinds under his superior, one-fifth of the rent, whether the teinds are valued or not.*[3]

In computing the amount of composition, the average annual value for the last seven years of salmon fishings and grass land is taken.[4] Shootings which are let, and shoot- Salmon fishings and grass lands. Shootings.

[1] *Lord Blantyre* v. *Dunn*, 1858, 20 D., 1188; *School Board of Neilston* v. *Graham*, 1887, 15 R., 44; and see *M'Laren, &c.* v. *Burns*, 1886, 13 R., 580.

[2] *Aitchison* v. *Hopkirk*, 1775, M. 15,060.

[3] *Thomson* v. *Simson*, 1825, 4 S., 224.

[4] *Magistrates of Inverness* v. *Duff*, 1771, M. 9300.

ings which, though unlet, are of such value that they ought to bring a rent if let,[1] have to be taken into account in computing the amount due in name of composition. It may be noted, in determining the rent for minerals to be taken in calculating composition, (1) that where minerals are let at a definite fixed rent, and there is no prospect of their immediate exhaustion, that rent is taken;[2] (2) that where a proprietor receives a return by a lordship on the minerals, the value of the minerals is capitalised, and a certain percentage on the capitalised value taken as the rent;[3] and (3) that although there are minerals in the lands which would yield a return if worked, their value is not to be considered so long as they are not worked.[4] The rule for determining what are fixtures in estimating the amount of a casualty due by a vassal to a superior is the rule applicable to a question regarding them between landlord and tenant, and not that applicable to the case of heir and executor; in other words, trade fixtures are not considered part of the heritable subject in the computation of a casualty.[5] Where lands have been subfeued the composition in a question with the superior and his own vassal is estimated thus:—(*a*) if the subfeu has been granted for a yearly feu-duty, the composition is that duty;[6] and (*b*) if it has been granted for a yearly feu-duty and a price, the composition is the duty as well as a year's interest on the price.[7] It is not determined whether a superior has any interest in the estimating of composition in a casualty falling to his vassal from a sub-vassal in the year in which the composition is exigible.[8] In connection with the question of composition, the provisions of section 7 of the Con-

Minerals.

Fixtures.

Subfeus.

Consolidation.

[1] *Stewart* v. *Bulloch*, 1881, 8 R., 381.
[2] *Sturrock* v. *Carruthers and Others*, 1880, 7 R., 799.
[3] *Allan's Trustees* v. *Duke of Hamilton*, 1878, 5 R., 510; *Sivright* v. *Straiton Estate Company (Limited)*, 1879, 6 R., 1208.
[4] See *M'Laren and Others* v. *Burns*, 1886, 13 R., 580.
[5] *Marshall* v. *Tannoch Chemical Company, Limited*, 1886, 13 R., 1042.
[6] *Ross* v. *Governors of Heriot's Hospital*, June 6, 1815, F.C.; aff. July 24, 1820, 6 Pat. App., 640.
[7] *Campbell* v. *Westenra*, 1832, 10 S., 734.
[8] *Ibid.*; Bell's Prin., sect. 721.

veyancing (Scotland) Act, 1874, are important. The section provides:—

> "No consolidation that may be effected under this Act or otherwise shall in any way affect or extend the rights or interests of any over-superior, or entitle him to any more than the duties or casualties to which he would have been entitled had there been no consolidation."

The effect of this section may be illustrated thus:—Suppose that before 1874 A feued to B with untaxed casualties, and B subfeued to C, also with untaxed casualties; that B re-acquired the subfeu from C, or that C acquired the mid-superiority from B; and that consolidation of the two fees followed in favour of B or C, as the case might be. In respect of consolidation prior to 1874, the composition payable to A would have been a year's rent of the property; if consolidation is effected in similar circumstances after 1st October 1874, the composition payable to A is a year's subfeu-duty, and not a year's rent of the property.[1] Where a party acquires right to long leases, and then purchases the lands, the long leases are extinguished *confusione*, and the composition due is not regulated by the rent in the leases, but by the actual annual value of the lands.[2] Where, however, a vassal has let on lease his lands, and his lessee has sublet them, the rent payable under the lease, and not that under the sublease, is taken as the measure of the casualty.[3]

Subleases.

Prior to the Conveyancing (Scotland) Act, 1874, there was no difficulty in determining the year the free rent of which was to be taken as the amount of composition. The year then taken was the year of the actual entry of the vassal, or the year in which the casualty was judicially demanded. But in respect that infeftment now implies entry with the superior, the question has arisen,—Which is the year the rent of which is to be taken as the amount of composition? There is as yet no decision of the Inner House directly settling this

Year the rent of which taken for composition.

[1] On section 7 see Mowbray's Analysis, 30; Begg's Conveyancing Code, 329; Sturrock's Analysis, 54.

[2] *Lord Blantyre* v. *Dunn*, 1858, 20 D., 1183.

[3] *Campbell* v. *Stuarts*, 1884, 22 S. L. R., 292; an Outer House decision by Lord Fraser acquiesced in.

question, but in *Straiton Estate Company* v. *Stephens*[1] the Court held that a casualty became payable as at the date when the Conveyancing (Scotland) Act, 1874, commenced, by an infeft proprietor of lands then in non-entry, though no casualty was claimed till several years afterwards, and several of the judges indicated that *vi statuti* the casualty became due and exigible at the date of the death of the last expressly entered vassal, irrespective of any demand by the superior, or at all events at the date of the vassal's infeftment, if subsequent to the death of the last expressly entered vassal. Following the principle indicated in this case, Lord Curriehill, in a decision[2] acquiesced in, held that, where the death of the last expressly entered vassal occurred after the implied entry of the vassal from whom a casualty was demanded, the rent of the year current at the date of the death of the last entered vassal was the measure of the composition. "It appears to me," said Lord Curriehill, in giving judgment, "that the Legislature meant to provide fixed and certain data for calculating the amount of this casualty, and made it actually due and payable to the superior at the date when his right of action emerged, the debt continuing to be due by the vassal, though without interest, until paid either voluntarily or under judicial demand." In *Steuart* v. *Murdoch and Rodger* there were no vassals impliedly entered between the last expressly entered vassal and the vassals impliedly entered, from whom the casualty was demanded, but in the more recent case of *Campbell* v. *Stuart*,[3] decided by Lord Fraser, this was so. The material circumstances of *Campbell* v. *Stuart* were:—The last entered vassal died in 1837; he by his settlement conveyed the lands to trustees, one of whom held them in 1874, and was consequently impliedly entered by the Conveyancing (Scotland) Act, 1874, with the superior; the trustee so impliedly entered disponed them in 1876 to Mrs. Stuart, who took infeftment in the same year.

[1] 1880, 8 R., 299.

[2] *Steuart* v. *Murdoch and Rodger*, 1882, 19 S. L. R., 649.

[3] 1884, 22 S. L. R., 292, acquiesced in.

Lord Fraser held that the year the rent of which was to be taken as the amount of the casualty due by Mrs. Stuart was the year of her implied entry, but in this case it made no difference in amount whether the rent of the year current (1874) when the trustee was impliedly entered in terms of the Conveyancing (Scotland) Act, 1874, or that of the year when Mrs. Stuart was impliedly entered was taken. To sum up these cases, it may be said (1) that where a casualty is demanded from a vassal who was impliedly entered during the lifetime of the last expressly entered vassal, the amount of composition is determined by the rent of the year of the death of the latter; (2) that where a casualty is demanded from a vassal who became impliedly entered after the last expressly entered vassal's death, and where there are no implied entries interposed between the date of the death of the last expressly entered vassal and the implied entry of the vassal from whom the demand is made, the amount of composition is determined by the rent of the year of the implied entry of the latter; and (3) that where a casualty is demanded from a vassal who became impliedly entered after the last expressly entered vassal's death, and where there are implied entries interposed between the date of the death of the last expressly entered vassal and the vassal from whom the demand is made, the amount of composition, according to the decision in *Campbell* v. *Stuart*, is also determined by the rent of the year of the implied entry of the latter, although perhaps the reasoning followed in *Straiton Estate Company* v. *Stephens* and *Steuart* v. *Murdoch and Rodger*, as well as in *Sivwright* v. *Straiton Estate Company*,[1] rather points to the adoption of the year of the implied entry of the first of the intermediate proprietors.

Taxed entry.

Before 1874 the *reddendo* usually stipulated for payment on the entry of an heir of a year's feu-duty over and above the feu-duty of the year of entry;[2] but this stipulation

[1] 1879, 6 R., 1208 (a case about minerals).

[2] Jur. Styles (4th ed.), vol. i., 19.

was unneccessary, for the payment was and is under old feu-rights due in name of relief, although not stipulated for. Instead of an heir on his entry paying relief, it was sometimes, though not very frequently, stipulated that he should pay a duplicand of the feu-duty in addition to the feu-duty of the year of entry.[1] In lieu of composition it was a frequent practice before 1874 to fix or "tax" at a certain sum the amount payable on the entry of singular successors in the clause of *reddendo*, and then the entry was said to be taxed.[2] Besides, it was competent to stipulate in the *reddendo* of a feu-charter that a casualty should be exigible on the occasion of each sale or transfer of the property as well as on the death of the vassal.[3] Clauses of taxation have, as a rule, received a strict interpretation on the ground that they limit the superior's rights. Thus, where there was a stipulation in the *reddendo* that the vassal's heirs and assignees should pay a double of the feu-duty the first year of their entry, it was interpreted as including assignees of the personal right before infeftment, but not purchasers from a grantee who had taken infeftment.[4] But if singular successors from a grantee infeft are, on a construction of the feu-right, included in a taxing clause, they will get the benefit of it.[5] The Second Division has held that, where a feu-contract granted in 1866 contained a stipulation in the dispositive clause that a duplication of the feu-duty should be payable at the expiry of every twenty-five years, and where the *reddendo* contained a stipulation for the annual feu-duty only, the duplication was to be deemed as in full of all casualties due *ex lege*.[6] To enable a vassal to found

[1] See *Earl of Zetland* v. *Carron Company*, 1841, 3 D., 1124.

[2] Bell's Prin., sect. 726; Bell's Lect., vol. i., 635; Jur. Styles (4th ed.), vol. i., 33.

[3] See *Morrison's Trustees* v. *Webster*, 1878, 5 R., 800.

[4] *Magistrates of Inverness* v. *Duff*, 1771, M. 9300; *Salmon* v. *Boyd*, 1751, M. 4181; and comp. *Hamilton* v. *Dunn*, 1853, 15 D., 925, and *Duke of Montrose* v. *Provan's Trustees*, 1887, 14 R., 378.

[5] *Innes* v. *Reid's Trustees*, 1822, 1 S., 518; *Hamilton* v. *Dunn*, *supra*; *Magistrates of Inverkeithing* v. *Ross*, 1874, 2 R., 48; *Duke of Montrose* v. *Provan's Trustees*, *supra*.

[6] *Magistrates of Dundee* v. *Duncan*, 1883, 11 R., 145.

on a clause of taxation, it must appear in the feu-right, not merely in a deed in implement of which the feu-right was granted.[1] It is not, however, lost by its omission from charters by progress;[2] and a superior, in respect of a clause in his own titles, may be obliged to give a vassal the benefit of a taxed composition.[3]

Redemption of casualties.

The Conveyancing (Scotland) Act, 1874, contains provisions for the redemption and commutation of casualties incident to any feu created prior to the commencement of the Act. All casualties may be redeemed on such terms as may be agreed on between the superior and the proprietor of the feu.[4] Failing agreement, all such casualties, *except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods*, may be redeemed by "the proprietor of the feu" in respect of which the same are payable, on the following terms:—

(*a.*) In cases where casualties are exigible *only on the death of the vassal*, such casualties may be redeemed on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of 50 per cent.

(*b.*) In cases where casualties are exigible on occasion *of each sale or transfer of the property, as well as on the death of the vassal*, such casualties may be redeemed on payment of two and a half times the amount of the casualty estimated as aforesaid payable on such occasions.

(*c.*) Where the casualty consists of a sum calculated on the footing *of an annual sum being paid for each year from the date of the last entry*, such casualty may be redeemed on payment of eighteen times the amount of such annual sum.

But these terms of redemption are accompanied by the

[1] *M'Lachlan* v. *Tait*, 1823, 2 S., 303.
[2] *Stewart* v. *Russell*, June 3, 1813, F.C.
[3] See *Learmonth* v. *Governors of Trinity Hospital*, 1854, 16 D., 580.
[4] Sect. 15.

proviso "that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid, and in the case of such annual sums the amount of such sums since the last payment thereof, and that the redemption shall apply only to future and prospective casualties."[1] Lord President Inglis expressed an opinion in *Edinburgh Roperie and Sailcloth Company* v. *Magistrates of Edinburgh*,[2] that a "proprietor of the feu," under section 15 does not include a person having only a personal title to the lands; but a proprietor infeft, and so constructively entered with the superior, has a right to redeem under the section, although the last vassal to whom the superior granted an entry is still alive;[3] and such a proprietor, although only proprietor of part of a feu, is entitled to redeem the casualties applicable to his part of it, irrespective of the casualties applicable to the remainder of the feu.[4] A prohibition against subinfeudation, fenced with an irritant clause, does not entitle the superior to demand for the redemption of casualties more than the highest casualty with an addition of 50 per cent.[5] On payment or tender of the redemption money, calculated in terms of section 15 of the Conveyancing (Scotland) Act, 1874, the superior is bound by section 16 to discharge the casualties, unless he elects to have the redemption money converted into an annual sum in accordance with the provisions of section 17. This section gives the superior the option of converting the redemption money into an annual sum equal to four per cent. on the capital; and the conversion can be carried into effect by a memorandum in the form of schedule G of the Act.

The consent of the superior's heritable creditors is not required to the commutation of casualties under section 17;

[1] Sect. 15; Mowbray's Analysis, 16; Begg's Conveyancing Code, 343; Sturrock's Analysis, 69.

[2] *Edinburgh Roperie and Sailcloth Company* v. *Magistrates of Edinburgh*, 1877, 4 R., 1032; aff. 1877, 6 R. (H.L.), 1.

[3] *Morris* v. *Brisbane*, 1877, 4 R., 515.

[4] *Edinburgh Roperie and Sailcloth Company, supra.*

[5] *Morris* v. *Brisbane, supra.* Two other cases under sect. 15, *M'Laren and Others* v. *Burns* and *School Board of Neilston* v. *Burn*, have already been cited.

but no discharge or redemption of casualties is effectual against heritable creditors without their consent thereto.[1]

Entails do not bar the redemption or commutation of casualties;[2] and mid-superiors have the same right of redeeming casualties as proprietors of the *dominium utile* have, section 19 enacting—

> "The person in right of any estate of superiority created prior to the commencement of this Act shall be entitled to redeem the casualties, legal or conventional, which may be payable to an over-superior, in the same manner and on the same terms and conditions as are herein-before enacted in respect to the redemption of casualties by a person in right of an estate of property."[3]

Sections 15, 16, 17, 18, and 19 apply to feus created prior to the commencement of the Act, and under these sections, apart from special agreement, the right of redemption is given only to the vassal, and the right of commutation only to the superior. But it will be remembered that where feu-rights stipulating or inferring casualties have been contracted prior to the passing of the Act, and have not been granted prior to the commencement of the Act, the right of commutation of casualties is given to the superiors or vassals by section 24, already cited.

Non-entry.

Before 1874 it was a fundamental principle in land rights that a superior was entitled to have a vassal entered in the feu. Accordingly, on the death of the last entered vassal in the lands feued, the lands were said to be in non-entry; and if the heir of that last entered vassal, or a singular successor in the lands, declined to enter *habili modo*, the superior was entitled to raise an action of declarator of non-entry to have it found that the lands were in non-entry, that the bygone non-entry duties (*i.e.*, the bygone feu-duties, or, in blench holdings, the retour duties) since the last vassal's death until the date of citation belonged to him, and that the full rents, maills, and duties of the lands belonged to him as from the date of citation. As already stated, no

[1] Sect. 16.
[2] Sect. 18.
[3] See p. 93.

lands are now deemed to be in non-entry, and the action of declarator of non-entry has been superseded by the introduction of an action of declarator and for payment of a casualty, section 4 (4) of the Conveyancing (Scotland) Act, 1874, providing—

> "No lands shall, after the commencement of this Act, be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action; and any decree for payment in such action shall have the effect of and operate as a decree of declarator of non-entry, according to the now existing law, but shall cease to have such effect upon the payment of such casualty, and of the expenses (if any) contained in said decree; but such payment shall not prejudice the right or title of the superior to the rents due for the period while he is in possession of the lands under such decree, nor to any feu-duties or arrears thereof which may be due or exigible at or prior to the date of such payment, or the rights and remedies competent to him under the existing law and practice for recovering and securing the same; and the summons in such action may be in or as nearly as may be in the form of schedule B hereto annexed."

Before 1874 a superior raising an action of declarator of non-entry had to be infeft in the lands themselves,[1] or in the superiority of them,[2] and he will not now have a title to sue an action of declarator and for payment of a casualty unless he be so infeft.

Non-entry was excluded before 1874 by the existence of an entered vassal, although divested by a conveyance and infeftment thereon,[3] and now the action of declarator and for payment of a casualty is barred during the lifetime of any vassal who was entered under the law as it stood prior to 1874, or who has paid a casualty to the superior since 1st October 1874. Further, non-entry was excluded before 1874, even after the death of the last-entered vassal in certain cases. Thus it was excluded (*a*) if there was

[1] *Park* v. *Robertson*, May 16, 1816, F.C.
[2] *Gardner* v. *Trinity House of Leith*, 1841, 3 D., 534.
[3] *Hay* v. *Auchnames*, 1630, M. 9291; *Fullerton* v. *Denholms*, 1678, M. 9293.

a liferenter in possession under a grant from the superior; (*b*) if a widower was in possession of his deceased wife's lands in virtue of his courtesy; and (*c*) to the extent of a third if a widow was in possession of her deceased husband's lands in virtue of her terce;[1] and the action of declarator and for payment of a casualty will now be excluded altogether in the two first of these cases, and to the extent of a third in the last of them.

Since the commencement of the Conveyancing (Scotland) Act, 1874, several cases[2] regarding casualties have been decided. By these cases it has been settled— Decisions since 1874 relating to casualties.

(1.) Where a proprietor of lands is infeft on an *a me vel de me* holding, express or implied, the effect of the implied entry under the provisions of section 4 of the Conveyancing (Scotland) Act, 1874, is to extinguish the mid-superiority previously existing, to preclude him, in answer to the superior's demand for composition, from putting forward the heir of the last expressly entered vassal and paying relief duty, and to make him liable in the payment of a composition;[3] and that whether the implied entry in his favour was prior or subsequent to the commencement of the Act.[4] Prior to 1874 it was quite settled that a proprietor of land infeft on an alternative holding, express or implied, could, on the

[1] Bell's Prin., sect. 710; Bell's Lect., vol. i., 623.

[2] *Ferrier's Trustees* v. *Bayley*, 1877, 4 R., 738; *Rossmore's Trustees* v. *Brownlie*, 1877, 5 R., 201; *Sivright* v. *Straiton Estate Company*, 1878, 5 R., 922; *Lamont* v. *Rankin's Trustees*, 1879, 6 R., 739, aff. 1880, 7 R. (H.L.), 10; *Hope* v. *Duke of Hamilton*, 1883, 10 R., 1122; *Duke of Hamilton* v. *Guild, &c.*, 1883, 10 R., 1117; *Crawfurd* v. *Dempster*, 1879, 6 R., 708; *Heriot's Hospital* v. *Carnegys*, 1884, 12 R., 30; *Mounsey* v. *Palmer*, 1884, 12 R., 236; *Mackintosh* v. *Mackintosh*, 1886, 13 R., 692; *Lord Home* v. *Lyell*, 1887, 15 R., 193; *Stuart* v. *Hamilton*, 1889, 16 R., 1030; *Stuart* v. *Jackson*, 1889, 17 R., 85; *Duke of Athole* v. *Stewart*, 1890, 17 R., 724; *Duke of Athole* v. *Menzies*, 1890, 17 R., 733; *Lord Advocate* v. *Moray*, 1890, 17 R., 945; and see also *Morrison's Trustees* v. *Webster*, 1878, 5 R., 800; *Stewart* v. *Gibson's Trustee*, 8 R., 270; and *Dick Lauder* v. *Thornton*, 1890, 17 R., 320.

[3] *Rossmore's Trustees* v. *Brownlie*, *supra*.

[4] *Ferrier's Trustees* v. *Bayley*, *supra*; *Stuart* v. *Hamilton*, *supra*; and *Lamont* v. *Rankin's Trustees*, *supra*.

death of the last entered vassal, tender for an entry the heir of that vassal, if he was willing to enter, and thereby save himself from the payment of composition ;[1] but the implied entry under the Conveyancing (Scotland) Act, 1874, having extinguished the mid-superiority, this method cannot now be resorted to by a proprietor who is infeft, and impliedly entered with the superior. The Act has therefore, notwithstanding its terms, increased the superior's rights to casualties.

(2.) So long as the title of a proprietor of lands remains personal, and there is no implied entry between the last entered vassal and himself, he can tender the heir of the last expressly entered vassal to the superior, and the superior cannot refuse to accept from the heir relief duty.[2]

(3.) Where different proprietors in succession have been infeft, and therefore impliedly entered, in the same lands, and no casualty has been demanded after the death of the last expressly entered vassal by the superior from them, a casualty paid by the proprietor in possession is held to be in respect of his own entry, and the superior has no claim against any intermediate vassal in respect of his implied entry, and is not entitled to exact any further casualty until the death of the proprietor who has paid the casualty.[3]

(4.) When the heir of the last expressly entered vassal acquires the lands by *mortis causa* disposition from his ancestor and takes infeftment thereon, and is therefore impliedly entered with the superior, the superior is only entitled to relief duty from him.[4]

[1] *Hill* v. *Mackay*, 1824, 2 S., 681.
[2] *Duke of Hamilton* v. *Guild*, *supra* ; *Hope* v. *Duke of Hamilton*, *supra*.
[3] *Mounsey* v. *Palmer*, 1884, 12 R., 236.
[4] *Mackintosh* v. *Mackintosh*, 1886, 13 R., 692 ; and see *Mackenzie* v. *Mackenzie*, 1777, M. App., *voce* Superior and Vassal, No. 2 ; *Magistrates of Musselburgh* v. *Brown*, 1804, M. 15,038 ; *Marquess of Hastings* v. *Oswald*, 1859, 21 D., 871.

(5.) Where testamentary trustees are infeft under the testamentary writings of the last expressly entered vassal, and do not hold for the heir of the truster, they are liable in composition to the superior,[1] and where the heir of the last expressly entered vassal gets a precept or writ of *clare constat*, but neither records it nor pays a casualty, and the testamentary trustees of the last expressly entered vassal thereafter take infeftment, the superior is not barred, in respect of the precept or writ of *clare constat*, from exacting composition from them, and the recording of the precept or writ after the action for a casualty has been raised is of no avail.[2] But where testamentary trustees do hold for the heir of the truster, their liability for casualties is limited by section 1 of the Conveyancing (Scotland) Acts (1874 and 1879), Amendment Act, 1887,[3] which provides—

> "Where by a trust-disposition and settlement, or other *mortis causa* writing, any heritable estate is conveyed to trustees for behoof of, or with directions to convey the same to, the heir of the testator, whether forthwith or after the expiration of any period of time not exceeding twenty-five years, or by virtue of which the heir of the testator has the ultimate beneficial interest in such estate, the trustees under such trust-disposition and settlement, or other *mortis causa* writing, shall not, upon their entering, or by reason of their having prior to the date of this Act entered, with the superior, by infeftment or otherwise, be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees; and the heir upon thereafter entering with the superior, by infeftment or otherwise, shall not be liable for any further casualty in respect of his entry, but whether the heir shall have been entered or not, another casualty shall become exigible upon his death in the same manner as if he had been duly entered with the superior."[4]

This section is not retrospective in effect;[5] but, apart altogether from its enactments, it appears to

[1] See *Lamont* v. *Rankin's Trustees*, *supra*.
[2] *Sivright* v. *Straiton Estate Company*, *supra*.
[3] 50 and 51 Vict., c. 69.
[4] See Sturrock's Analysis, 189.
[5] *Stuart* v. *Jackson*, *supra*.

be still an open question whether, if testamentary trustees hold for the heir, and a casualty is demanded from them, they are liable for more than relief.[1] At all events, it has been held that where testamentary trustees have held, or, on an event which happened, have come to hold exclusively for the heir of the truster, and have been impliedly entered with the superior, and have had conferred on them a power of sale which it was not necessary to exercise, and have conveyed to the heir-at-law prior to any demand having been made against them for a casualty, the heir is not liable for composition, but only for relief duty.[2]

(6.) The infeftment of trustees under an *inter vivos* trust-disposition for payment of debts, containing a power of sale, and an obligation on the trustees to re-convey after the trust purposes are satisfied, does not divest the granter of the feudal fee, nor entitle the superior to a casualty;[3] and when a trust created by a *mortis causa* deed under which trustees are infeft is purely temporary in its nature, and the right in the trustees so infeft is a mere burden on the fee, the trust right is no impediment to the heir entering on payment of relief duty.[4]

From cases decided prior to 1874,[5] it would seem to follow (1) that if an institute under a deed in fee-simple or of entail pays composition to a superior after 1874, the superior will not be entitled to exact more than relief duty from a substitute under the deed; but that an institute under such a deed, if he is the heir of the last investiture, is not bound to pay more than relief duty, and can leave the superior to exact

[1] See *Lamont* v. *Rankin's Trustees*, *supra*, and Lord Kinnear in *Stuart* v. *Jackson*, *supra*; but see Lord Rutherfurd Clark in *Duke of Athole* v. *Stewart*, *infra*.

[2] See *Duke of Athole* v. *Menzies*, 1890, 17 R., 733; *Duke of Athole* v. *Stewart*, 1890, 17 R., 724; *Stuart* v. *Jackson*, *supra*.

[3] *Marquis of Huntly* v. *Earl of Fife*, 1887, 14 R., 1091.

[4] *Lord Home* v. *Lyell*, 1887, 15 R., 193.

[5] See Bell's Lect., vol. ii., 1142, and cases there cited.

composition from the first substitute who is a stranger to the last investiture; and (2) that if trustees make up a title and pay composition, and they thereafter grant, according to the directions of the truster, a deed in fee-simple or of entail to an institute and substitutes, the institute and substitutes will not be liable for a higher duty than relief.[1]

A superior was not, prior to 1874, bound without express stipulation to enter corporations. If he did enter them, he lost right to casualties in all future time, because a corporation never dies.[2] Nor was a superior bound, prior to 1874, without express stipulation to enter trustees; but if he did enter them, he could not exact, apart from special agreement, another casualty until the death of the last survivor of them.[3] But a superior cannot now prevent either a corporation or trustees from taking entry, and section 5 of the Conveyancing (Scotland) Act, 1874, provides for the casualties to be now paid by them under feu-rights created before the commencement of the Act, as well as for those payable by persons having separate interests under such feu-rights in terms of which payment of a taxed composition is due on the occasion of each sale or transfer of the property as well as on the occasion of the death of each vassal. That section is as follows:—

> "Unless where it has been or shall be otherwise stipulated, corporations shall pay at the date at which the first composition would have been payable if this Act had not been passed, and every twenty-fifth year thereafter, a sum equal to what but for the passing of this Act would have been payable on entry by a singular successor; and where a composition payable on the death of the vassal shall become exigible from any trustee or body of trustees, another composition shall be payable at the end of every twenty-five years, so long as the lands shall be vested in such trustee or trustees; and where by the terms of the feu-rights of the lands a taxed composition is payable on the occasion of each sale or transfer of the property, as well as on the occasion of the death of each vassal, and a composition shall in consequence of the acquisition of the property become exigible from any corporation or from

[1] See further on casualties, Mr. Hislop's articles in Scot. Law Review, vol. iii., 69, 89; also his Lectures on Scots Law, 65-94.

[2] *Hill* v. *Merchant Company of Edinburgh*, Jan. 17, 1815, F. C.; and see *Learmonth* v. *Governors of Trinity Hospital*, 1854, 16 D., 580; *Campbell* v. *Orphan Hospital*, 1843, 5 D., 1273; *Heriot's Trust*, 1890, 17 R., 937; and Bell's Lect., vol. ii., 1146.

[3] See Bell's Lect., vol. ii., 1146; Bell's Prin., sect. 724.

any trustee or body of trustees, another composition, unless where it has been or shall be otherwise stipulated, shall be payable at the end of every fifteen years from the date of such acquisition by such corporation or trustee or trustees, so long as the lands shall be vested in such corporation or trustee or trustees, with such interest, if any, as may be stipulated for in the feu-rights during the not payment of casualties; provided always, that in the event of such corporation or of such trustee or trustees ceasing to be proprietors of the lands after having paid a composition or compositions in terms of this section the successor of such corporation or of such trustee or trustees who shall be duly infeft in the lands at the expiration of twenty-five years where a composition is payable on the death of the vassal, or at the expiration of fifteen years where a composition is payable on the occasion of each sale or transfer as well as on the occasion of each death, from the date of the last payment of composition as aforesaid, shall then pay a composition, and the casualties for and in respect of such lands shall thereafter become due and payable at the same time and in the same manner as if such lands had never been vested in such corporation or in such trustee or trustees; and where, by the terms of the feu-rights of the lands a taxed composition is payable on the occasion of each sale or transfer of the property as well as on the occasion of the death of each vassal, and where an entry is implied in terms of this Act in favour of two or more parties having separate interests as liferenter and fiar respectively or as successive liferenters, a composition, or in the case of parties interested *pro indiviso* a rateable share of a composition, shall be due by and exigible from each of the parties who shall take or derive benefit under the implied entry in the order in which they shall severally take or derive benefit under such implied entry, with such interest, if any, as may be stipulated for in the feu-right during the not payment of casualties."[1]

Casualty of liferent escheat.

The casualty of liferent escheat is not of much practical importance, but in virtue of it the superior has right to possession of his vassal's feu as long as the vassal lives and continues in rebellion. This casualty arises by denunciation of the vassal for a criminal cause unrelaxed for a year and day, or by his receiving sentence of death and escaping. But the possession taken by the superior in respect of the casualty is burdened with the vassal's debts made real on the lands; and, besides, the fee remains with the vassal, and may be disposed of by him in any way which does not prejudice the liferent escheat of the superior.[2]

[1] On section 5 see Mowbray's Analysis, 14 *et seq.*; Begg's Conveyancing Code, 324; Sturrock's Analysis, 47. This section superseded section 113 of the Titles to Land Consolidation (Scotland) Act, 1868, in which provision was made for casualties in the case of lands held by trustees for religious or educational purposes; see also *Governors of Cauvin's Hospital* v. *Falconer*, 1863, 1 Macph., 1164; and *Crawfurd* v. *Dempster*, *supra*.

[2] See Bell's Prin., sects. 733, 734; Menzies, 526.

VI. Effect of assignation of writs in statutory form.

VI. ASSIGNATION OF WRITS.—The statutory form of this clause in the transmission of a fee of property already created is—"And I assign the writs, and have delivered the same according to inventory;"[1] and it imports, unless specially qualified, "an absolute and unconditional assignation to such writs and evidents, and to all open procuratories, clauses, and precepts, if any, and, as the case may be, therein contained, and to all unrecorded conveyances to which the disponer has right."[2] This statutory form is not suited to an original feu-right in which there is a clause of assignation of writs, but to the effect only of maintaining and defending the right of the grantee, and an obligation on the part of the superior to make them furthcoming on all necessary occasions.[3] Where the writs in favour of the superior are to be assigned to an extent beyond what is appropriate to them as feudal titles, —as, for example, when the vassal is to get right to any special obligation, such as an obligation of relief from stipend and augmentations of stipend contained in the superior's titles—the right requires to be specially assigned to him. It has also to be observed that the clause of assignation of writs in the statutory form in a disposition may carry more to one disponee than to another. If, for example, a superior in feuing grants a clause of relief from minister's stipend and future augmentations in favour of his vassal, and his vassal dispones to a third party, that party will get the benefit of the obligation without special assignation thereof to him on the ground that it is an inherent condition of the original grant, and therefore runs with the lands.[4] But if a vassal in transmitting his feu inserts such a clause of relief in favour of the purchaser, the purchaser will have the benefit of it, but neither the heir of the purchaser (unless he makes

[1] 31 and 32 Vict., c. 101, sect. 5, and schedule (B); sect. 5 re-enacts, with verbal alterations, provisions in 10 and 11 Vict., c. 48, sect. 1.

[2] *Ibid.*, sect. 8, re-enacting, with verbal alterations, 10 and 11 Vict., c. 48, sect. 3.

[3] See p. 38.

[4] *Stewart* v. *Duke of Montrose*, 1860, 22 D., 755, aff. 1863, 1 Macph. (H.L.), 25; *Lennox* v. *Hamilton*, 1843, 5 D., 1357.

up his title by service) nor a disponee of the purchaser is entitled to found on the obligation of relief unless it has been specially assigned, because it is an obligation collateral to and irrespective of the title to the land.[1] Prior to the Conveyancing (Scotland) Act, 1874, the form of assignation to obligations or rights of relief which did not pass under the general assignation of writs was as full and explicit as the assignation to an ordinary bond; but by section 50 of the Act a short form of assignation has been introduced, and the assignation may be in a separate deed or form part of another deed.

By section 19 of the Titles to Land Consolidation (Scotland) Act, 1868,[2] it was enacted that where a person should have granted or should grant a general disposition of his lands, whether by a conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing, such disposition should be a sufficient warrant for a notarial instrument in favour of the disponee. The Court held, however, in the case of *Smith* v. *Wallace*,[3] that, to enable a person, other than the original disponee under a general disposition, to complete a title by a notarial instrument in terms of section 19, he required to have an assignation, general or special, of the general disposition. This decision, in respect that a general disposition does not usually contain an assignation of writs, made it incompetent to use two or more general dispositions as connecting links of a series of titles.[4] The Conveyancing (Scotland) Act, 1874, to remedy this state of the law, provides by section 29—

> "No decree, instrument, or conveyance under this Act, and no other decree, instrument, or conveyance, whether dated before or after the commencement of this Act, shall be deemed to be invalid because the series of titles connecting the person obtaining such decree, or expeding such instrument, or holding such conveyance, with the person last infeft, shall contain as links of the series two or more general dispositions, or because any general disposition forming a part of the series does not contain a clause of assignation of writs."[5]

[1] *Spottiswoode* v. *Seymer*, 1853, 15 D., 458; *Horne* v. *Breadalbane's Trustees*, 1841, 3 D., 435; rev. 1842, 1 Bell's App., 1; *Sinclair* v. *Breadalbane*, 1844, 6 D., 378, rev. 1846, 5 Bell's App., 353.

[2] 31 and 32 Vict., c. 101.

[3] 1869, 8 Macph., 204.

[4] See Begg's Conveyancing Code, 365.

[5] On section 50 see Begg's Conveyancing Code, 365; Sturrock's Analysis, 101; Mowbray's Analysis, 31.

VII. Assignation to Rents.

VII. Assignation to Rents.—The statutory form of this clause is, "And I assign the rents."[1] This clause, unless specially qualified, is "held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry." Farms, in a question of rents, may be divided into two classes,—(*a*) agricultural, and (*b*) pastoral; for where a farm is partly arable and party pastoral it is considered as between seller and purchaser to be an agricultural farm if the income or profits are chiefly derived from the arable land, and a pastoral farm if the income or profits are chiefly derived from the pastoral land.[2] Whatever be the conventional terms for payment of rent, the legal terms are—(*a*) in the case of agricultural farms, Whitsunday after the crop is sown, and Martinmas after the crop is reaped; and (*b*) in the case of pastoral farms, Whitsunday on entry and Martinmas thereafter. Accordingly, on the supposition that A lets to B two arable farms, X and Y, with entry at Martinmas 1886; that the first half-year's rents for X and Y are due by the leases at Martinmas 1887—*i.e.*, the rents are conventionally postponed for six months—and that A feus or dispones to C the estate containing the farms, and that the conveyance contains a clause of entry as at Martinmas 1888, and an assignation of rents in the statutory form—"And I assign the rents"—C will get neither the half-year's rent due at Martinmas 1888, because that rent is for the possession for the half-year ending at Whitsunday 1888, nor the half-year's rent due at Whitsunday 1889, because that rent is due for the possession for the half-year ending at Martinmas 1888; but he is entitled to the half-year's rent due at Martinmas 1889,

Effect of statutory clause.

Farms of two classes.

Legal terms for payment.

[1] 31 and 32 Vict., c. 101, sect. 8 and Schedule (B); Begg's Conveyancing Code, 29.

[2] *Petley* v. *M'Kenzie*, 1805, Hume 186; *M'Clymonts* v. *Cathcart*, 1848, 10 D., 1489; *Campbell* v. *Anstruther*, 1836, 9 Scot. Jur., 163; Rankine on Leases, 303.

because that rent is for the half-year's possession from Martinmas 1888 to Whitsunday 1889, and, of course, to all subsequent half-year's rents.

Case where shooting rent.

In the case of *Lord Glasgow's Trustees* v. *Clark*,[1] a seller sold lands consisting of two arable farms, assigning the rents "due and payable from and after the term of entry," which was Martinmas 1886; and it was held, as regards the farm rents payable at Whitsunday 1887 for the crop and year 1886, that the proportion thereof for the period prior to Martinmas 1886 fell to the seller and the rest to the purchaser, and, as regards the rent of the shootings, which were let from 1st August 1886 to 31st March 1887, that the proportion of the rent for the period from 1st August to 11th November 1886 fell to the seller and the balance to the purchaser.[2] Intimation of the assignation of rents in a feu-right or deed of transmission to tenants is not necessary after infeftment is taken.[3] If infeftment is not taken, intimation of it should be made to the tenants. This intimation will be sufficient to preclude the tenants from paying their rents to the granter of the deed containing the assignation;[4] and by it a preference to the rents will be secured in a question with an arrester of the rents whose arrestment was used after the intimation, or with a subsequently intimated personal right by assignation. But the intimation of the assignation of the rents, although good to the extent mentioned, is liable to be defeated by the completion of a real right in the person of a creditor of the seller, or in the person of another disponee of the seller.[5]

Effect of intimation of assignation of rents before infeftment.

Apart from the assignation to rents in a conveyance of land, the right to them follows the land, and where there is no assignation of the rents and no special provision on the subject of what portion of the rents is to belong to the seller

Apart from assignation, right to rents follows lands.

[1] 1889, 16 R., 545.

[2] See Rankine on Leases, 313, for other cases where statutory form of assignation not used.

[3] *Webster* v. *Donaldson*, 1780, M. 2902.

[4] See *Flowerdew* v. *Buchan*, 1835, 13 S., 615.

[5] *Huntly* v. *Hume*, 1628, M. 2764; *Erskine* v. *Wallace*, 1748, M. 2901; Menzies, 558; Bell's Lect., vol. i., 641.

and what to the purchaser, the purchaser becomes entitled to the rents of the estate for the possession that follows his term of entry, and the rents for the possession prior to that term belong to the seller.[1]

VIII. Clause of Obligation to relieve of Public Burdens, &c.—The statutory form of this clause in a disposition is—"And I bind myself to free and relieve the said disponee and his foresaids of all feu-duties, casualties, and public burdens;"[2] and, unless specially qualified, it is held "to import an obligation to relieve of all feu-duties or other duties or services or casualties payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry." Whilst the statutory form of the clause may be used in an original feu-right, the form given in the style of the feu-charter above[3] is preferable. The effect of the clause in either form is that the granter of the conveyance is not liable in a question with the grantee in payment of any public burdens imposed on the land, and due for the possession after the date of entry.

VIII. Obligation to relieve of public burdens.

Effect of statutory clause.

If a seller is due a casualty to his superior, a purchaser from him, in the absence of agreement to the contrary, is entitled now, as before 1874,[4] to call on him to pay it before accepting a conveyance from him;[5] and where a disponee with a clause of relief from casualties takes infeftment and is thereby impliedly entered with the superior, and is found liable for a casualty exigible on account of the death of the last expressly entered vassal before the date of his disposition, he is entitled to claim relief from his disponer therefor.[6] Whether the disponee in this case would

Relief from casualties.

[1] Lord President Inglis in *Lord Glasgow's Trustees* v. *Clark*, *supra*, p. 106.

[2] 31 and 32 Vict., c. 101, sect. 8, and schedule (B).

[3] See p. 38.

[4] See opinions in *Straiton Estate Company, Limited*, v. *Stephens*, 1880, 8 R., 299.

[5] *Gardiner* v. *Anderson*, 1799, M. 15,037.

[6] *Straiton Estate Company, Limited*, v. *Stephens*, *supra*.

have been entitled to repayment, in the absence of a clause of relief, remains undecided.[1]

Relief from burdens to be imposed.

But in feu-rights and deeds of transmission clauses of relief from public burdens imposed or to be imposed on the lands are not infrequent. Such clauses are interpreted so as to give effect to the meaning and intention of the parties as expressed in the contract;[2] and the actings of parties for a period of years will be held as construing an ambiguous clause of relief.[3] Such clauses are held, as a rule, not to include burdens imposed by laws enacted after the date of the obligation, inasmuch as these are presumed not to have been in contemplation at the time of entering into the contract. "Parties may no doubt," said Lord Robertson in *Scott* v. *Edmond*,[4] "so frame a clause of relief that it shall embrace all burdens, whether the continuation of old taxes or their extension, or the creation of new taxes never dreamt of at the date of the contract. But clauses to have this effect must be very clearly expressed, and under such general words as 'imposed or to be imposed' total relief from new and unthought-of burdens is not to be presumed." If, however, a public burden falling under a clause of relief is re-imposed by a statute under which the object and the incidence of the burden are the same as under the former law, but in which improvements in administration are contained, the burden so re-imposed is not considered a burden imposed by a supervenient law. Thus, in the case of *Dunbar's Trustees* v. *British Fisheries Society*,[5] lands were feued in 1823 for the erection of a harbour, and the superior bound himself to relieve the vassal of the whole "cess or land tax, . . . ministers' stipends, schoolmasters' salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and pay-

Burdens imposed by supervenient laws.

Burdens the object and incidence of which are same as under the law at date of contract.

[1] Opinions for and against were expressed in *Straiton Estate Company, Limited.*

[2] See *Duff* v. *Earl of Seafield*, 1883, 11 R., 126.

[3] *Jopp's Trustees* v. *Edmond*, 1888, 15 R., 271.

[4] 1850, 12 D., 1077.

[5] 1877, 5 R., 350; aff. 1878, 5 R. (H.L.), 221.

able for or from the same in all time coming." The vassals in 1877 claimed relief from poor-rates imposed on them under the Poor Law Amendment Act, 1845, as owners of the lands and buildings erected thereon, and relief therefrom was granted on the ground that the poor-rate imposed by the Act of 1845 was in its object and incidence the same as the poor-rate payable at the date of the contract, and therefore not a new burden for the relief of which the superior was not bound.[1] If, however, the incidence or the application of a burden is altered by a statute so as to become a new burden, a clause granting relief from the former will not entitle to relief from the latter. "There may be," said Lord Chancellor Cairns in *Dunbar's Trustees* v. *British Fisheries Society*, "a burden existing at the date of the contract, and subsequently the incidence of that burden may be so altered that, although the burden in specie remains the same,—the same in name, and the same in application,—still a change subsequently made by law in the incidence of the burden may be such that it becomes, with reference to a contract of this kind, a new burden, and is no longer covered by the contract; or, on the other hand, the incidence of the burden may remain the same, and yet the application of the burden may be so entirely different that the burden will become, although the same in name, yet a different burden in specie, and no longer be covered by the contract." Accordingly, where, at the date of the feu in the case of *Dunbar's Trustees*, the roads of the county were maintained under a local Statute Labour Conversion Act, providing for an assessment according to valued rent, leviable from owners in the personal occupation of their land, &c., and at the date when the action was raised by the vassals for relief from road assessment as well as poor-rates, the roads were maintained under an Act which abolished tolls, and assessed the whole sum required for the roads on owners and occupiers

Where incidence or application of old burden changed.

[1] See also *Lees* v. *Mackinlay*, 1857, 20 D., 6; *Hunter* v. *Chalmers*, 1858, 20 D., 1311; *Paterson's Trustees* v. *Hunter*, 1863, 2 Macph., 234; *Nisbet* v. *Lees*, 1869, 7 Macph., 881; *Preston* v. *Magistrates of Edinburgh*, 1870, 8 Macph., 502; *Wilson* v. *Magistrates of Musselburgh*, 1868, 6 Macph., 483.

according to real rent, relief for the road assessment was refused to the vassals, because, although the burden was the same in name, and the object of the burden was the same as at the date of the feu, yet the incidence of the burden had been so entirely altered that it had become a new burden. For similar reasons a disponee,[1] under a disposition dated in 1861, with a clause of relief from "all schoolmaster's salary" from henceforth and in all time coming, was held not entitled to relief from his disponer of school-rates imposed under the Education (Scotland) Act, 1872.

Relief from stipend and augmentations thereof.

Most of the cases relating to clauses of relief from burdens imposed or to be imposed relate to relief claimed from augmentation of stipend, which is a burden on the teinds. "Warrandice," says Mr. Duff, "against payment of teinds and stipend does not protect against future augmentations, unless that term be used, or words admitting of no other construction. In construing a clause of this nature it is of importance to observe if the teinds do or do not belong to the disponee. If the former, then it will require very clear expressions to relieve him from future augmentations of stipend; but if the latter, warrandice simply against teinds and stipends seems necessarily to imply relief from present and future stipends. The reason is that as the surplus teind over what is payable to the minister belongs to the titular, and warrandice against payment of teinds relieves the disponee of the burden of payment to the titular of whatever that surplus consists of at the date of the conveyance, the burden so taken from the disponee cannot be revived, in whole or in part, by the modification of a larger stipend to the minister, who in effect thus merely takes away another portion of teind from the titular."[2]

The obligation to relieve of burdens imposed or to be imposed is not confined to the lands, but extends to all

[1] *Steuart* v. *Earl of Seafield*, 1876, 3 R., 518.

[2] Duff's Feudal Conveyancing, 89; and see authorities cited in Rankine on Land Ownership, 716.

buildings erected thereon;[1] nor is it affected or diminished by the vassal having subfeued the lands to sub-vassals;[2] nor is it limited to the amount of the feu-duty—at least in cases where buildings or other improvements were in the contemplation of parties at the date of the grant.[3] It has also been settled that an obligation of relief granted by a superior is binding on his successors in the superiority, but not on his general representatives, when he has simply bound himself and his heirs and successors to implement it.[4] It has already been pointed out that where an obligation of relief is granted by a superior to a vassal it runs with the lands, but that when the relationship of superior and vassal does not subsist between the granter and grantee of such an obligation, the singular successors of the grantee require to have it specially assigned to them.[5]

Relief from burdens to be imposed not confined to lands; not affected by subfeus; not limited to feu-duty. Clause binds successors in superiority.

IX. Clause of Warrandice.—The statutory form of this clause in a disposition is, "And I grant warrandice,"[6] and it, unless specially qualified, is "held to imply absolute warrandice as regards the lands, and writs, and evidents, and warrandice from fact and deed as regards the rents."[7] The clause in its statutory form is as applicable to an original feu as to a deed of transmission. If there is no clause of warrandice in a conveyance of heritage, absolute warrandice is implied if a full price has been paid; but it will be noted that where the deed, in which a clause of warrandice in its statutory form occurs, relates to heritage, and whether it is onerous or gratuitous, the warrandice under it is absolute as regards the lands, and writs, and evidents, and from

IX. Clause of warrandice.

Effect.

[1] *Dunbar's Trustees* v. *British Fisheries Society*, *Lees* v. *Mackinlay*, *Hunter* v. *Chalmers*, *Paterson's Trustees* v. *Hunter*; *Nisbet* v. *Lees*, 1869; *Preston* v. *Magistrates of Edinburgh*, all cited *supra*; and see *Smith* v. *Maitland*, 1876, 3 R., 281.

[2] See Lord Curriehill in *Dunbar's Trustees*, and *Montgomerie* v. *Hamilton*, 1841, 3 D., 942; *Hunter* v. *Chalmers*, *supra*.

[3] *Dunbar's Trustees* v. *British Fisheries Society*, *supra*, and Rankine on Land Ownership, 723.

[4] *Stewart* v. *M'Callum*, 1868, 6 Macph., 382; aff. 1870, 8 Macph. (H. L.), 1.

[5] See pp. 103 and 104.

[6] 31 and 32 Vict., c. 31, sect. 8, schedule (B), Nos. 1 and 2.

[7] *Ibid.*, sect. 8.

fact and deed as regards the rent. The obligation created by the clause against the granter is to indemnify the grantee in case of the conveyance in his favour being reduced or of the subject being evicted from him, in whole or in part, on any ground not attributable to the grantee, and that the rents are due, but not that the debtors are solvent. But absolute warrandice, express or implied, does not, in the absence of agreement to the contrary, protect the grantee against losses or burdens caused by supervenient laws,[1] nor against losses and burdens natural to the right,[2] or arising from the nature or legal effects of ownership,[3] nor from servitudes, unless of a very burdensome sort, although in practice the best course is to exempt servitudes from the warrandice.[4] Nor does it entitle him to claim the discharge of an old right of real warrandice on which action has not been threatened.[5] Absolute warrandice under a deed dealing with heritage warrants that which is conveyed by the dispositive clause, and warrants the assignation of writs for the purpose for which they are assigned,—*i.e.*, the purpose of maintaining the grantee in possession of what the dispositive clause conveys.[6]

What absolute warrandice does not cover.

A grantee who is in right of absolute warrandice can recover, on eviction, the full damage sustained by him thereby;[7] but it is not decided whether, when the subject has fallen in value, the grantee is entitled only to the value as at the time of eviction, or to the price paid by him for it.[8] Action of recourse, in virtue of a right of warrandice, arises after eviction takes place; but action of recourse is competent when eviction is threatened—(1) if eviction is threatened

What grantee can recover on eviction.

[1] See *Watson* v. *Law*, 1667, M. 16,588; *Muirhead* v. *Lord Colvil*, 1715; 5 B. Sup., 125.

[2] *Drummond* v. *Steuart*, 1549, M. 16,565; *Cunningham* v. *Cuthbertson*, 1829, S. Teind Cases, 175; *MacRitchie's Trustees* v. *Hope*, 1836, 14 S., 578; Bell's Prin., sect. 894.

[3] *Lumsden* v. *Gordon*, 1682, M. 16,606; *Plenderleath* v. *E. Tweeddale*, 1800, M. 16,639.

[4] *Urquhart* v. *Halden*, 1835, 13 S. 844; *Gordonston* v. *Paton*, 1682, M. 16,606; *Reid* v. *Shaw*, 1822, 1 S., 334.

[5] *Durham's Trustees* v. *Graham*, 1800, M. 16,641, but see Bell's Lect., vol. i., 218.

[6] *Brownlie* v. *Miller*, 1878, 5 R., 1076; aff. 1880, 7 R. (H.L.), 66.

[7] *Cairns* v. *Howden*, 1870, 9 Macph., 284.

[8] See *Cairns* v. *Howden*, *supra*.

on a ground which is unquestionable and which proceeds from the fault of the granter,—*e.g.*, where he has granted double grants of the same subject in favour of different parties;[1] or (2) if the party against whom the action lies disputes his liability to relieve in the event of eviction.[2]

Threatened eviction ought in all cases to be intimated to the party liable in the event of eviction,[3] because if the purchaser defends and is successful, he has no claim in virtue of his warrandice to the expense of his defence;[4] but if he defends and omits no competent defence, and is unsuccessful, he has a claim for the expenses of the action against the party bound in warrandice.[5] If, however, he defends and omits a competent defence, and is unsuccessful, he loses his right of recourse.[6] A purchaser is not bound to defend his right, if untenable, by process of law.[7]

When there are any leases of part of the lands feued in a feu-right or disponed in a disposition, it is the proper practice to except them from the warrandice clause.[8]

Warrandice granted by trustees.

When trustees feu or otherwise dispone land for a full price, the form of the warrandice clause granted by them is as follows:—"And we, as trustees foresaid, warrant these presents from our own facts and deeds only, and bind and oblige the trust-estate under our charge, and the parties beneficially interested therein, in absolute warrandice."[9] After consenting to certain bonds being granted by his author over subjects in which a person was infeft as trustee, the latter granted a bond and disposition in security for a new loan, which he bound himself "as trustee" to repay, and, in security of the personal obligation, he, "as trustee," disponed

[1] *Smith* v. *Ross*, 1672, M. 16,596. Ersk. 2, 3, 32; Bell's Prin., sect. 895.

[2] *Melville* v. *Erskine's Trustees*, 1842, 4 D., 385; and see Lord Ormidale in *Leith Heritages Co.* v. *Edinburgh and Leith Glass Co.*, 1876, 3 R., 789.

[3] Ersk., 2, 3, 32.

[4] See Stair ii., 3, 46; Bell's Lect., vol. i., 219; *Inglis* v. *Anstruther*, 1771, M. 16,633.

[5] See Bell's Lect., vol. i., 219.

[6] *Clerk* v. *Gordon*, 1681, M. 16,605; and see Bell's Prin., sect. 895.

[7] *Downie* v. *Campbell*, Jan. 31, 1815, F.C.

[8] Jur. Styles, vol. i., 31, 119; and see Bell's Lect., vol. i., 644.

[9] Jur. Styles, vol. i., 31.

the subjects, and granted a clause of warrandice in these terms: "I grant warrandice." The holder of this bond raised an action against the representative of the trustee, in which it was held that the trustee was personally bound at least in warrandice from fact and deed, and accordingly that he was liable for loss arising from the prior bonds to which he was a consenter, because warrandice from fact and deed infers a protection against eviction by reason of the granter's own act or omission, past or future.[1] In giving judgment, it was questioned, but not decided, whether the trustee, in respect of the clause of warrandice granted by him, was not personally liable in absolute warrandice.

X. Clause of registration. Effect of clause.

X. CLAUSE OF REGISTRATION.—The statutory form of this clause in a disposition is—"And I consent to registration hereof for preservation,"[2] and it imports, unless specially qualified, a consent to registration and a procuratory of registration in the books of Council and Session, or other judges' books competent, therein to remain for preservation.[3] This form is quite applicable to an original feu-right; but whereas a disposition can be recorded either "in the books of Council and Session or other judges' books competent," a feu-charter can only be recorded for preservation under the Statute 1693, c. 35, in the books of Council and Session.[4]

Clause of direction.

CLAUSE OF DIRECTION.—Immediately before the testing clause of any conveyance of lands, it is competent to insert a clause of direction, specifying the part or parts of the deed which the granter desires to be recorded in the Register of Sasines. If the deed bearing a warrant of registration, in which express reference is made to the clause of direction, is presented for registration, the keeper of the register records

[1] *Horsbrugh's Trustees* v. *Welsh*, 1886, 14 R., 67.

[2] 31 and 32 Vict., c. 101, sect. 8, schedule (B), No. 1.

[3] 31 and 32 Vict., c. 101, sect. 138, re-enacting, with additions, 10 and 11 Vict., c. 48, sect. 1, and 23 and 24 Vict., c. 143, sect. 30.

[4] Jur. Styles, vol. i., 32; Bell's Lect., vol. i., 645.

(1) such part or parts only as are referred to in the clause of direction, along with (2) the clause of direction, (3) the testing clause, and (4) warrant of registration. If the warrant of registration makes no reference to the clause of direction, the whole deed is put on record. If a notarial instrument is expede on a conveyance with a clause of direction, it must not omit the part or parts directed to be recorded.[1] When, however, the granter of a deed is anxious to secure the insertion of any real burdens and qualifications in any notarial instrument expede on it, he may not only use the clause of direction, but also, by the terms of the deed, direct them to be inserted or referred to in every instrument, and when this direction is made, they "shall be inserted or referred to in manner provided by this Act in every instrument applicable to such lands to be expede in virtue of this Act."[2]

XI. Testing Clause.[3]

XI. Testing clause.

Completion of grantee's title.

The question has now to be discussed, on the assumption that the granter of a feu-charter is feudally infeft,—How can the grantee under it now complete a feudal title in his person?

If a feu-charter contains (*a*) a general description of the lands;[4] or (*b*) a particular description of them;[5] or (*c*) a description of them by statutory reference;[6] or (*d*) a description of them by general name in terms of section 13 of the Titles to Land Consolidation (Scotland) Act, 1868,[7] the grantee can complete his title—

(1.) *By having the feu-charter recorded, with a warrant of registration in the form of schedule* (H), *No.* 1, *of the Titles to Land Consolidation (Scotland) Act,* 1868, *in his favour, in the division of the General Register of Sasines applicable to the lands therein con-*

[1] 31 and 32 Vict., c. 101, sect. 12.
[2] *Ibid.*, sect. 146.
[3] For testing clause and authentication see Digest of Moveable Rights.
[4] See p. 41.
[5] See p. 42.
[6] See p. 43.
[7] See p. 47.

tained.[1] The warrant may be signed either by the grantee or grantees, or by his or their agent or agents, and in the latter case the warrant may be signed either by an individual agent or by the subscription of any firm of which such agent may be a partner. If such feu-charter contains a clause of direction, and it is desired to put on the Register of Sasines only those parts directed by the deed to be recorded, the warrant of registration will be in the form of schedule (F), No. 2, of the Titles to Land Consolidation (Scotland) Act, 1868;[2] or,

(2.) *By having expede and recorded, with a warrant of registration in the form of schedule* (H), *No.* 1, *of the Titles to Land Consolidation (Scotland) Act*, 1868,[3] *in his favour in the division of the General Register of Sasines applicable to the lands therein contained, a notarial instrument in the form of schedule* (J) *of that Act.*

If, on the other hand, the feu-charter contains (*a*) a description of the lands in general terms,[4] or (*b*) a description by reference not in statutory form,[5] of them—and it may be said that neither of such descriptions in a feu-right is to be met with in practice—the grantee, as a general disponee, can complete his title :—

(1.) *By having expede and recorded, with a warrant of registration in the form of schedule* (H), *No.* 1, *of the Titles to Land Consolidation (Scotland) Act*, 1868, *in his favour in the division of the General Register of Sasines applicable to the lands therein contained, a notarial instrument in the form of schedule* (L) *of that Act, the charter being used as a mid-couple.*[6]

The above methods of completing a grantee's title under a

[1] 31 and 32 Vict., c. 101, sect. 15, and schedule (H).
[2] *Ibid.*, sect. 12.
[3] *Ibid.*, sect. 17.
[4] See p. 48.
[5] See p. 48.
[6] 31 and 32 Vict., c. 101, sect. 19.

feu-charter have been in use since the commencement of the Titles to Land Consolidation (Scotland) Act, 1868, but for some time after the commencement of that Act it was competent to record a feu-charter or other writ either in the Particular Register of Sasines applicable to the lands or in the General Register of Sasines. But by section 8 of the Land Registers (Scotland) Act, 1868,[1] it was ordained that the whole particular registers of sasines should be discontinued not later than the 31st December 1871. The following table shows the districts and shires for which Particular Registers of Sasines were kept prior to the Land Registers (Scotland) Act, 1868, and the respective dates of their termination:—

Dates of termination of Particular Registers.

Aberdeenshire and Kincardineshire,	Feb. 6, 1869
Argyllshire, Dumbartonshire, Buteshire, Arran, and Tarbert,	Jan. 12, 1871
Ayrshire, and Bailiaries of Kyle, Carrick, and Cunninghame,	Sept. 30, 1869
Banffshire,	Feb. 27, 1869
Berwickshire and Bailiary of Lauderdale,	Mar. 17, 1869
Caithness-shire,	Feb. 27, 1869
Dumfriesshire, and Stewartries of Kirkcudbright and Annandale,	Sept. 30, 1869
Edinburghshire, and Constabularies of Haddington, Linlithgow, and Bathgate,	Feb. 6, 1869
Elginshire, Forres, and Nairnshire,	Feb. 27, 1869
Fifeshire,	Jan. 12, 1871
Forfarshire,	Feb. 27, 1869
Inverness-shire, Ross-shire, Sutherlandshire, and Cromartyshire,	Feb. 6, 1869
Kinross-shire,	Dec. 31, 1871
Lanarkshire (excepting the Regality of Glasgow),	Mar. 17, 1869
Orkney,	Feb. 6, 1869
Perthshire (excepting the Stewartry of Menteith),	Jan. 12, 1871
Renfrewshire, and the Regality of Glasgow,	Mar. 30, 1871
Roxburghshire, Selkirkshire, and Peeblesshire,	Sept. 30, 1869
Shetland,	Feb. 6, 1869
Stirlingshire, Clackmannanshire, and Stewartry of Menteith,	Jan. 12, 1871
Wigtownshire,	Sept. 30, 1869

Perhaps it ought to be pointed out that a feu-right or a deed of transmission may still contain a precept of sasine either in the form in use before the Infeftment Act, 1845, or in the form introduced by that Act. Although a precept is in the deed, infeftment may be taken as above described,

[1] 31 and 32 Vict., c. 64, sect. 8.

or an instrument of sasine may be expede and recorded. Whatever the form of the precept, the instrument of sasine may be in the form introduced by the Infeftment Act, 1845; but if an instrument of sasine in the form in use prior to 1845 is to be expede, the deed must have a precept in the form in use prior to that date, and the instrument must be preceded by symbolical delivery on the lands, and followed by registration within sixty days of its date.

Points to be observed in taking infeftment.

In connection with the taking of infeftment, these points require to be kept in view:—

(1.) All writings whatsoever which may be recorded in any Register of Sasines require to have warrants of registration signed by the party on whose behalf it is desired to record them, or by an agent, and in the latter case the warrant may be signed either by an individual agent, or by the subscription of any firm of which such agent may be a partner.[1]

(2.) Writings affecting land held burgage prior to the commencement of the Conveyancing (Scotland) Act, 1874 are recorded in the Burgh Register, and writs affecting lands in Paisley held by booking tenure prior thereto are recorded in the Register of Booking at Paisley; whereas writings affecting lands not so held are recorded in the appropriate division of the General Register of Sasines.

(3.) The General Register of Sasines in Edinburgh and the Particular Register of Sasines were established by 1617, c. 16; and the Statute of 1693, c. 13, declared all infeftments preferable according to the date and priority of registration. The Particular Registers of Sasines were abolished, as stated above, by the Land Registers Act, 1868; and the General Register of Sasines, which is now the only competent register for the publication of all deeds relating to land

[1] 37 and 38 Vict., c. 98, sect. 33; and 31 and 32 Vict., c. 101, sects. 15, 141.

not held burgage or by booking tenure prior to the commencement of the Conveyancing (Scotland) Act, 1874, has been so kept from and after 31st December 1868—(*a.*) that the writs applicable to each county are entered in a separate series of presentment books; (*b.*) that the writs are minuted in a separate series of minute-books, and engrossed in a separate series of register volumes in the order of presentment; (*c.*) that where any writ contains land in more than one county, such writ is entered by the ingiver in the presentment book of such of these counties as may be specified in the warrant of registration, and is minuted in the minute-book of such of these counties or county as are specified in the warrant, and is engrossed at length in the division of the register applicable only to one of the said counties, and a memorandum is entered in each division of the register applicable to the other counties or county in the presentment book of which it is entered as aforesaid, setting forth the volume of the register, and the folio or folios of such volume in which such engrossment is made, such memorandum being deemed to be equivalent to full engrossment of such writ in the division of the register wherein such memorandum shall be entered.[1] The Lands Registers Act, 1868, enacts that where any writ containing lands or heritages in more than one county shall not have a warrant of registration endorsed or written thereon applicable to all the counties to which it applies, the registration of such writ shall notwithstanding, as regards the county or counties mentioned in the warrant and in the minute-books and register volumes of which county or counties it has been recorded, or a memorandum thereof, be effectual, and that it is

[1] 31 and 32 Vict., c. 64, sect. 3.

competent afterwards to present such writ with a new warrant of registration thereon, and to minute and register such writ in the register of any other county or counties to which such writ applies, in terms of such new warrant, and that in the case of such subsequent registration it is not necessary to engross the writ at length in the division of the register applicable to such county or counties, but that the same may be effected by the insertion of a memorandum in such division of the register in the manner before set forth, and that such subsequent registration is effectual as regards the county or counties to which such writ applies, and to which such new warrant is applicable, of and from the date of such subsequent registration.[1] The Land Registers Act, 1868, also provides that where any writ is transmitted by post for registration in the General Register of Sasines the keeper shall, upon the receipt of such writ, cause the same to be acknowledged to the sender, and to be presented in terms of the warrant of registration thereon by a clerk in his office, to be appointed by him for that purpose, and who shall be held as the ingiver of the writ, and that such writ shall be recorded in the same manner as any other writ presented for registration; and that where two or more writs transmitted by post shall be received by the keeper at the same time, the entries thereof in the presentment book and minute-book shall be of the same year, month, day, and hour, and such writs shall be deemed and taken to be presented and registered contemporaneously.[2] Further, the Act provides that no error or omission in any presentment book of the General Register of Sasines to be kept in accordance with the Act shall

[1] 31 and 32 Vict., c. 64, sect. 5.

[2] *Ibid.*, sect. 6; and 31 and 32 Vict., c. 101, sect. 142.

invalidate or in any way affect injuriously the registration of any writ recorded in said register;[1] and that it shall not be necessary to register in the Books of Council and Session for the purpose of preservation, or of preservation and execution, any writ competent to be registered in the General Register of Sasines, and which shall have been so registered, and that such writ, being registered in the Register of Sasines, shall be held to be registered also in the Books of Council and Session for preservation, or for preservation and execution, as the case may be, provided that (*a.*) such writ when presented for registration in the Register of Sasines has in the warrant of registration an addition specifying that the writ is to be registered for preservation, or for preservation and execution, as well as for publication; and (*b.*) that no writ shall be held to be registered for the purpose of execution which does not contain a procuratory of registration, or clause of consent to registration, for the purpose of execution in the body of the writ. Such registration, it is declared, has all the legal effects of registration in the Books of Council and Session for preservation, or for preservation and execution, as the case may be, as well as of registration in the General Register of Sasines; and all extracts of a writ so registered, and the warrants of execution therein contained, have all the like force and effect as any extract from the Books of Council and Session.[2] By the Registered Writs Execution Act, 1877,[3] it is enacted that where any writ containing *in gremio* thereof a procuratory or clause of registration for preservation and execution has been registered in

[1] 31 and 32 Vict., c. 64, sect. 7.

[2] See *ibid.*, sect. 12; 31 and 32 Vict., c. 101, sects. 138, 141; and 40 and 41 Vict., c. 40, sects. 5, 6.

[3] 40 and 41 Vict., c. 40.

the General Register of Sasines upon a warrant for preservation, but not for execution, it shall be competent to present for registration in the said register an extract of such registered writ, having a warrant of registration written thereon, bearing that such extract is to be registered for preservation and execution, and that it shall not be necessary to engross *ad longum* in the register the extract, but that the registration thereof may be effected by the insertion of a memorandum of such extract in the appropriate division or divisions of the register, setting forth the volume of the register, and the folio or folios of such volume in which the original writ is engrossed.

(4.) "In case of any error or defect in any instrument," the Titles to Land Consolidation Act, 1868, provides, "or in the recording of any deed or conveyance, or of any warrant of registration recorded or to be recorded in any Register of Sasines, or in any warrant of registration thereon, or in the recording of such warrant, it shall be competent of new to make and record such instrument, or of new to record the deed or conveyance with the original or a new warrant of registration, as the case may require."

(5.) Unless it is averred and proved that erasures in instruments of sasine and other instruments have been made for the purpose of fraud, or the record thereof is not conformable to the instruments as presented for registration, such instruments are not challengeable on the ground that any part of them is written on an erasure;[1] and "no challenge," the Conveyancing (Scotland) Act, 1874,[2] declares, "of any deed, instrument, or writing recorded in any

[1] 6 and 7 Will. IV., c. 33; and 31 and 32 Vict., c. 101, sect. 144.

[2] 37 and 38 Vict., c. 98, sect. 54.

register of sasines shall receive effect on the ground that any part of the record of such deed, instrument, or writing is written on erasure, unless such erasure be proved to have been made for the purpose of fraud, or the record is not conformable to the deed, instrument, or writing as presented for registration."

(6.) Extracts of all conveyances or deeds, warrants of registration, and instruments recorded in the Register of Sasines make faith in all cases as the recorded conveyances or deeds, warrants, and instruments themselves would have done, except where any such conveyance or deed, warrant, or instrument so recorded shall be offered to be improven.[1]

Blench-Charter.

BLENCH-CHARTER.—The blench-charter is now seldom used. The only differences between it and the feu-charter are that the dispositive clause states that the lands are sold and in blench, instead of feu-farm, disponed, that the clause of *tenendas* states that the subjects are to be held of the granter in free blench farm, fee, and heritage for ever, and that the clause of *reddendo* stipulates for payment of an illusory duty, *e.g.*, one penny Scots, if asked only.[2]

Feu-Disposition.

FEU-DISPOSITION.—Instead of the feu-charter, the form of the disposition with a holding *de me* was sometimes used to constitute a feudal legal fee. The form of the feu-charter and the disposition are, however, now the same.[3]

Feu-Contract.

FEU-CONTRACT.—Unlike the feu-charter, blench-charter, and feu-disposition, the feu-contract is a bilateral deed, and it is used when parties wish to be able to enforce by direct personal diligence on the deed the obligations undertaken under it. It contains a clause of registration in which parties consent to registration both for preservation and for execution.[4]

[1] 31 and 32 Vict., c. 101, sect. 142.
[2] Jur. Styles, vol. i., 34.
[3] Jur. Styles, vol. i., 35; Menzies, 635.
[4] *Ibid.*, vol. i., 35.

Investiture *propriis manibus.*

INVESTITURE *PROPRIIS MANIBUS.*—Now investitures *propriis manibus* are used only by husbands to give liferent rights to their wives, and the Titles to Land Consolidation (Scotland) Act, 1868,[1] enacts that where it is desired to give investiture *propriis manibus* it shall be competent for the person in whose favour a conveyance has been or shall be granted or conceived to record the conveyance or deed itself in the Register of Sasines, with a warrant of registration thereon in, or as nearly as may be in the form of No. 3 of schedule (H) of the Act, signed by such person, and that such conveyance or deed, being so recorded along with such warrant, shall have the same legal force and effect in all respects as if the conveyance or deed had been followed by an instrument of sasine, or of resignation and sasine *propriis manibus*, expede in favour of the wife of such person, and signed by such person, and recorded at the date of recording the said conveyance or deed, according to the law and practice theretofore in use.[2] The warrant of registration on a conveyance presented for registration *propriis manibus* first directs registration on behalf of the husband in the register of the county or counties applicable to the lands, and then registration on behalf of his wife in these terms:—"And also *ex propriis manibus* on behalf of L., wife of the said A. B., in liferent." In respect that there is no warrant in favour of the wife other than that in the warrant of registration, the husband himself must in this case sign the warrant of registration.

[1] 31 and 32 Vict., c. 101, sect. 15. see Bell's Lect., vol. i., 661, and
[2] For the former law and practice, Menzies, 593.

CHAPTER III.

MISSIVES OF SALE; MINUTE OF SALE; ARTICLES OF ROUP; DISPOSITION.

How a feudal estate, once created, is transferred.

If a vassal has a feudalised title, the transference of his estate is accomplished by his granting a disposition to his disponee. If the vassal has not a feudalised title, he transfers his right to the estate by granting an assignation, written on or apart from the disposition assigned to his disponee. The assignation of an unfeudalised title will be treated in another chapter; and before the disposition is spoken of, reference may be made to writs, which often, but not necessarily, precede the granting thereof—

I. Missives of Sale.
II. Minute of Sale.
III. Articles of Roup.

Sales of land require writing, unless *rei interventus* has taken place.

An agreement to sell land is binding on neither the seller nor the purchaser until it is reduced to writing. The writing must be either holograph or tested, and bind both parties.[1] If, however, a verbal and concluded agreement to sell land has been followed by *rei interventus*, as by payment of the price or part of it, *locus pœnitentiæ* is excluded.[2] But in this case the agreement has to be proved by writ or oath of party; the acts constituting *rei interventus* can be proved *prout de jure*.[3]

Missives of sale. Essentials.

I. Missives of Sale.—If in a sale of land missives—an offer and an acceptance[4]—are used, they (1) require to show

[1] See *Fulton* v. *Johnston*, 1761, M. 8446; *Barron* v. *Rose*, 1794, M. 8463.

[2] Bell's Prin., sects. 25, 26, and authorities there cited.

[3] *Gowan's Trustees* v. *Carstairs*, 1862, 24 D., 1383.

[4] Jur. Styles, vol. i., 73.

consensus in idem as to the subjects sold, and price;[1] and (2) must be probative of the parties themselves or their authorised agents.[2] The missives usually state the price, but an agreement in them to have the price or some other term of the sale settled by arbitration will prevent resiling on the part of one of the parties.[3]

Minute of sale —when used.

II. MINUTE OF SALE.—When from any cause a disposition cannot be granted at the date of sale, or where the state of the seller's title is doubtful, or, it may be, when the conditions of sale are numerous, a minute of sale is preferable to missives.

Contents of Minute.

The contents of an ordinary minute of sale are that the vendor agrees to sell and the purchaser to buy certain subjects, which are described at length, or by reference, on the following or similar terms:—(1) that the price is a certain sum: (2) that on payment of the price the seller shall deliver—(*a.*) a disposition, with all usual clauses, to the purchaser; (*b.*) a valid title to the subjects; (*c.*) official searches, real and personal, for the respective prescriptive periods (see p. 129): (3) that the purchaser is to have right to rents, &c. after the date of entry; and (4.) that any question of dispute is to be settled by a person named as referee.[4] Either the minute or the missives of sale are a good ground for raising an action of adjudication in implement.

Articles of Roup.

III. ARTICLES OF ROUP.—When lands are sold by public roup, the conditions of the sale are contained in articles of roup. After the subjects to be exposed for sale are described, either particularly or by reference in statutory form, the articles set forth—(1) the upset price; (2) the excess of an offer above a preceding offer; (3) term of entry; (4) a provision about the deposit of the price, in whole or in part; (5) a provision that on failure to deposit the sale may be declared forfeited;

Contents of articles.

[1] See *Stirling* v. *Honyman*, 1824, 2 S., 765; *Nelson* v. *Assets Company, Limited*, 1889, 16 R., 898.

[2] *Whyte* v. *Lee*, 1879, 6 R., 699.

[3] *Earl of Selkirk* v. *Nasmith*, 1778, M. 627; and *Earl of Aberdeen* v. *Laird*, 1823, 2 S., 527.

[4] Jur. Styles, vol. i., 75.

(6) a provision that on payment searches and a disposition of subjects are to be delivered; (7) a provision that titles are to be delivered to the extent of a legal progress; (8) the knowledge of offerers as to the rental; (9) the way in which the expense of the transfer is to be borne; (10) a reference to arbiters named; (11) the judge of the roup; and (12) the penalty to be paid by the party failing to perform.[1]

In connection with the missives of sale, the minute of sale, and articles of roup, several important questions occur; and among them are these: *First*, What is a valid legal or prescriptive progress of titles? *Second*, What registers require to be searched for incumbrances? *Third*, What is the legal effect of an agreement to take the title as it stands?

Prescriptive progress of titles.

Prescriptive Progress of Titles.—Before the Conveyancing Act, 1874, section 34, came into operation, the Act 1617, c. 12, contained the law of positive prescription. The Act 1617, c. 12, required for a prescriptive title in land rights forty years' possession, actual or civil, but complete in degree, continually and together, in virtue of an infeftment, and without lawful interruption.[2] Accordingly the law of prescription, before it was altered by the Conveyancing Act, 1874, demanded, in the absence of contrary stipulation, from a seller of an estate—(1) an infeftment in the lands dated forty years prior to the date of the disposition to the buyer; (2) titles connecting him with such infeftment; (3) the warrant of such infeftment—*e.g.*, feu-charter, disposition, &c., if the progress started from the infeftment of a singular successor;[3] but if the prescriptive progress started from the infeftment of an heir, the seller did not require to produce the warrant of the heir's infeftment[4]—*e.g.*, precept of *clare constat*, &c.; and (4) there had to be in virtue of such infeftment forty years' possession, actual or civil, continuous, and complete in degree, and that exclusive of the years of minority of any

Requirements of Act 1617, c. 12.

Prescriptive progress before 1874.

[1] Jur. Styles, vol. i., 77.

[2] On positive prescription see Rankine on Land Ownership, 23 *et seq.*; Bell's Prin., sect. 2002 *et seq.*

[3] Ersk. 3, 7, 4.

[4] *Ibid.*; *Earl of Argyle* v. *Laird of M'Naughton*, 1671, M. 10,791.

Changes by Conveyancing Act, 1874.

proprietor. Section 34 of the Conveyancing Act, 1874, has altered the old law of prescription with regard to the period of prescription. According to the Conveyancing Act—(1) any *ex facie* valid irredeemable title to an estate in land, recorded in the appropriate Register of Sasines, is sufficient foundation for prescription ; (2) possession following on such recorded title for the space of twenty years continually and together, peaceably and without lawful interruption, is, for the purposes of the Statute 1617, c. 12, equivalent to possession for forty years by virtue of heritable infeftments, for which charters and instruments of sasine or other sufficient titles are produced according to the provisions of 1617, c. 12 ; and (3) if such possession has continued for thirty years, no deduction is to be made for minority or legal disability. But the Act, it is thought, has not altered the old rule, that if a prescriptive progress starts from the infeftment of a singular successor, the seller has to produce the warrant of it,[1] nor has it altered the old law relating to the acquisition of any servitude or of any public right of way or other public right, to acquire which forty years' possession is still necessary. As a decree of adjudication is not an *ex facie* valid irredeemable title, there must be now, as before 1874, forty years' possession after the expiry of the legal, in virtue of the infeftment taken on it, to secure a valid prescriptive title.[2] In *Buchanan and Geils* v. *Lord Advocate*[3] an opinion was expressed by the Court that the effect of section 34 of the Conveyancing Act, 1874, was to substitute twenty for the forty years required by the Act 1617, c. 12, for all the purposes of the latter Act ; and in *Brodie* v. *Mann*[4] it was held that the section had not shortened the period of the *negative* prescription as regards the extinction of a burden affecting property.[5] As before 1874, so now, an heir not infeft may ascribe his possession to his ancestor's infeftment,

Decree of adjudication and prescription.

[1] See Lord Adam in *Glen* v. *Scales*, 1881, 9 R., 317.

[2] *Hinton* v. *Connell's Trustees*, 1883, 10 R., 1110.

[3] 1882, 9 R., 1218.

[4] 1884, 11 R., 925 ; aff. 1885, 12 R. (H.L.), 52.

[5] See 1469, c. 28 ; 1474, c. 54.

and a disponee not infeft can ascribe his possession to his author's infeftment.[1] The buyer is entitled to resile from his obligation to pay the price if the seller is unable to give him a valid prescriptive title;[2] and the buyer may bring the transaction to an end if the seller fails to produce a title within a reasonable time.[3]

Valid title must be produced, and within a reasonable time.

Registers to be searched for Incumbrances and Diligences. —Not only is a seller bound to show a valid title to the subjects, but he is also bound, if there is no contrary agreement, to furnish a search showing that the subjects are free from incumbrances and diligences.[4] If incumbrances or diligences—it matters not when constituted, or whether disclosed by the registers or not—exist, he is bound to have them removed, otherwise the buyer may resile from the sale. The registers to be searched are—

Registers to be searched.

1. Sasine Registers.

(1.) The Particular Register of Sasines, &c. for the district or shire in which the lands are situated. These local registers were discontinued at different dates by the Lands Registers Act, 1868.[5]

(2.) General Register of Sasines for all parts of Scotland, ending 31st December 1868.

(3.) General Register of Sasines (divisional and current), commenced on 1st January 1869, and so kept that there are separate presentment books, minute-books, and register volumes for writs applicable to each county.

(4.) Burgh Registers (established by 1681, c. 11) in the case of burgage subjects.

(5.) Register of Booking in Paisley in the case of lands held by booking tenure.

2. Records of Personal Diligence.

(1.) Register of Abbreviates of Adjudications.

[1] See Bell's Lect., vol. ii., 705.
[2] *Robertson* v. *Rutherford*, 1840, 2 D., 1494.
[3] *Raeburn* v. *Baird*, 1832, 10 S., 761.
[4] Bell's Lect., vol. ii., 714.
[5] 31 and 32 Vict., c. 64, sect. 8, and see p. 117.

(2.) General Register of Inhibitions.

(3.) Particular Register of Inhibitions for the county in which the subjects are situated.

(4.) Register of Inhibitions and Adjudications.

The Particular Registers of Inhibitions were abolished as at 31st December 1868, and the General Register of Inhibitions and the Register of Abbreviates of Adjudications were made one register by the Land Registers Act, 1868,[1] viz.—the Register of Inhibitions and Adjudications.

The Titles to Land Consolidation (Scotland) Act, 1868[2]—(1) made it competent, before or after execution of any inhibition, whether by separate letters or contained in a summons before the Court of Session, to register in the General Register of Inhibitions a notice thereof, and if the inhibition itself and the execution of it be recorded not later than twenty-one days thereafter, the inhibition has effect from the registration of the notice, but otherwise only from the date of the registration of the inhibition and execution;[3] (2) provided that no inhibition is to have effect against *acquirenda*, unless an estate is destined at the date of the inhibition to the inhibited person, by a deed of entail or other indefeasible title;[4] (3) enacted that no summons of reduction, or of constitution, adjudication, or constitution and adjudication, has any effect in rendering litigious the lands to which such summons relates, except from and after the date of the registration of a notice of the summons.[5] The Conveyancing Act, 1874,[6] not only shortens the period of positive prescription, but also enacts that all inhibitions shall prescribe in five years, unless they are recorded of new before the expiration of each period of five years, or are continued by a memorandum applicable to them which has to be recorded before the expiration of such period.[7]

What search can now be demanded.

These important enactments have given rise to great diversity of opinion regarding the search which can compe-

[1] Sects. 16, 17.
[2] 31 and 32 Vict., c. 101.
[3] Sect. 155.
[4] Sect. 157.
[5] Sect. 159.
[6] 37 and 38 Vict., c. 94.
[7] Sect. 42.

tently be demanded by a buyer from a seller. As regards the sasine records, which show the incumbrances, if any, on the property to be sold or burdened, it is the general opinion that a search against the subjects ought to take place in them from a date forty years prior to the date of closing the proposed transaction. The search will therefore be for forty years back from the date of the transaction—(1) in the Particular Register of Sasines for the district or shire in which the subjects are situated to the end of the register; (2) in the General Register of Sasines for all parts of Scotland to the end of the register; and (3) in the General Register of Sasines (divisional and current) for the county or district from the commencement of the register. If the subjects are held burgage, the Burgh Register of Sasines, and if the subjects are held by booking tenure (a tenure only existing in Paisley), the Register of Booking, instead of the registers named, will be searched. Opinions are by no means the same as to what is required for a search in the Personal Diligence Records, which show whether the subjects are affected by diligence. The compilers of the Juridical Styles[1] recommend a search "in the General Register of Sasines and in the Particular Register of Sasines for the county or district in which the lands lie, to their close; and since its commencement, the General Register of Sasines for the county or district, or in the Burgh Register of Sasines, as the case may be, from a date forty years prior to the date of closing the proposed transaction; and in the Register of Abbreviates of Adjudications for the period from the date of recording the title which forms the foundation of the prescriptive progress, or earlier if required to show the discharge of any sequestration or recorded diligence, but not for a longer period than forty years in any case; and in the Register of Inhibitions for five years against the successive proprietors of the property for the last forty years, within which period all inhibitions now prescribe,

In the sasine records.

In personal records.

[1] Vol. i., 489.

unless renewed in terms of the 42d section of the Conveyancing Act of 1874." In addition to the registers named above, there ought to be a search in the Register of Entails, if there is any reason for supposing that the lands may have been included in a deed of entail, the search going back to the date, or supposed date, of the entail.[1]

Burdens not disclosed by search.

There may be several burdens which do not appear on record. Among the burdens not disclosed by a search may be these—(1) courtesy; (2) terce; (3) servitudes; a positive servitude being constituted (*a*) by prescriptive possession for forty years, or (*b*) by grant followed by possession, as well as (*c*) by grant appearing in the record; and a negative servitude by grant which may or may not enter the record; (4) succession duty, a first charge, by 16 and 17 Vict., c. 51,[2] on the interest of the successor to the lands; (5) leases. A search for the ordinary period will not necessarily disclose (6) heritable securities which were constituted before the date whence the prescriptive title starts, and which have been kept in existence by the payment of interest; nor (7) adjudications before the prescriptive period and followed by possession. Nor will the ordinary search disclose either objections on the ground (8) of forgery,[3] (9) or of force and fear,[4] (10) or of deathbed,[5] which are pleadable against onerous disponees; or (11) claims of ancestors' creditors under the Statute 1661, c. 24; or (12) securities for repairs on subjects in burghs constituted by jedge warrant of the Dean of Guild Court; or (13) years of minority falling to be deducted from the years of prescription.

The current and future feu-duty is not an incumbrance which the seller, in the absence of express or implied[6] stipulation to the contrary, is bound to remove.[7]

[1] Bell's Lect., vol. ii., 716.

[2] Sect. 42; and see 52 Vict., c. 7, sect. 12.

[3] 1617, c. 12.

[4] *Willocks* v. *Callender*, 1776, M. 1519; *Wightman* v. *Graham*, 1787, M. 1521; *Fraser* v. *Black and Knox*, Dec. 13, 1810, F.C.

[5] Duff's Feudal Conveyancing, 184. Reduction *ex capite lecti* was abolished by 34 and 35 Vict., c. 81, as regards persons dying after 16th August 1871; but the testamentary writings of persons dying before that date may still be subject to challenge *ex capite lecti*. See *Gray* v. *Gray*, 1872, 10 Macph., 854.

[6] See *Paton* v. *Stuart*, 1825, 3 S., 653.

[7] Bell's Lect., vol. ii., 717.

Stipulation to take Title as it stands.—A stipulation that a buyer shall take the title as it stands is not literally construed. If the title held by the seller is only subject to a defect which can be remedied, the buyer must implement the contract of sale, and get the defect remedied at his own expense;[1] but if the seller's title is radically bad and cannot be made good, the buyer may resile from the transaction.[2] The buyer cannot retain the subject and object to the title. Stipulation to take title as it stands.

The Disposition of Feudal Subjects.

The disposition of a feudal estate will now be considered. The clauses of the disposition before the passing of the Infeftment Act of 1845[3] were these:— Disposition.

I. The Introductory Clause.
II. Dispositive Clause.
III. Obligation to infeft and manner of holding.
IV. Procuratory of Resignation.
V. Clause of Warrandice.
VI. Assignation of Writs and Rents from a certain time.
VII. Clause of Warrandice of that Assignation.
VIII. Obligation to free the Subjects of Public Burdens.
IX. Clause of Delivery of Titles.
X. Clause of Registration.
XI. Precept of Sasine.
XII. Testing Clause.[4]

Successive Acts shortened some of these clauses and abolished others. By the Infeftment Act, 1845,[5] a short form of the precept of sasine was introduced. The Lands Transference Act, 1847,[6] introduced a short statutory form of the clauses of term of entry, obligation to infeft, procuratory or clause of resignation, assignation of writs, assignation of rents, obligation to relieve of public burdens, warrandice, and Changes in form. By Infeftment Act, 1845. By Lands Transference Act, 1847.

[1] *Anderson* v. *Matheson*, Dec. 4, 1818, F.C.; *Carruthers* v. *Stott*, 1825, 4 S., 34; *Sorley's Trustees* v. *Grahame*, &c., 1832, 10 S., 319.

[2] See *Waddell* v. *Pollock*, 1828, 6 S., 999.

[3] 8 and 9 Vict., c. 35.

[4] See Jur. Styles (4th ed.), vol. i., 94; Duff's Feudal Conveyancing, 189.

[5] Sect. 5.

[6] 10 and 11 Vict., c. 48, sects. 1, 2, 3.

registration, and repeated the form of precept of sasine introduced by the Infeftment Act, 1845, and declared the legal import of these clauses. By the Titles Act, 1858,[1] the obligation to infeft and the precept of sasine were made unnecessary. By the Titles to Land Consolidation Act, 1868,[2] the provisions of the Lands Transference Act and Titles Act, 1858, were substantially re-enacted. The Conveyancing Act, 1874,[3] having made infeftment imply entry as from the date of the infeftment, rendered the expression of the manner of holding and the clause of resignation quite unnecessary.

By Titles Act, 1858 (superseded by Consolidation Act, 1868).

By Conveyancing Act, 1874.

Modern disposition.

The following are therefore the clauses of the disposition in its present style:—

I. Narrative Clause.
II. Dispositive Clause.
III. Term of Entry.
IV. Assignation of Writs.
V. Assignation of Rents.
VI. Obligation to relieve of Public Burdens.
VII. Clause of Warrandice.
VIII. Clause of Registration.
IX. Testing Clause.[4]

The form of the disposition is as follows:—

"I, A (*designation*), heritable proprietor of the subjects hereinafter disponed, IN CONSIDERATION of the sum of £ sterling, instantly paid to me by B (*designation*) as the price thereof, of which sum I hereby acknowledge the receipt and discharge the said B, DO hereby SELL and DISPONE to the said B and his heirs and assignees whomsoever, heritably and irredeemably, ALL and WHOLE (*here describe the subjects conveyed, stating the parish where this can be done, and county, or the burgh and county, in which these are situated, or refer to particular description as contained in a prior recorded conveyance, deed, or instrument, in terms of schedule (O) of* 37 *and* 38 *Vict., c.* 94), together with my whole right, title, and interest, present and future, therein (*if the subjects are to be held under any burdens or restrictions not already constituted, these will be inserted as shown in the style of the feu-charter; and if held under burdens or restrictions already constituted, these will be referred to in terms of schedule (D) of* 31 *and* 32 *Vict., c.* 101): WITH ENTRY at the term of : AND I assign the writs, and have delivered the same according to inventory hereto annexed and

[1] 21 and 22 Vict., c. 76, sect. 5.
[2] 31 and 32 Vict., c. 101, sects. 5, 6.
[3] 37 and 38 Vict., c. 94, sect. 4.
[4] Jur. Styles, vol. i., 80.

subscribed by me as relative hereto (*or otherwise, as may be desired*): AND I assign the rents: AND I bind myself to free and relieve the said B and his foresaids of all feu-duties, casualties, and public burdens: AND I grant warrandice: AND I consent to registration hereof for preservation.—IN WITNESS WHEREOF, &c.[1]

What has been said on the similar clauses in the feu-charter is applicable to the clauses of the disposition. Some remarks on the clauses—now unnecessary in a disposition—may be of advantage:—

(1.) The Obligation to infeft and manner of holding;
(2.) The Procuratory or Clause of Resignation *in favorem*; and
(3.) The Precept of Sasine.

Obligation to infeft.

Obligation to infeft and manner of holding.—In ancient times it was not in the power of a vassal to alienate his feu so as to put his disponee in his own place. He could do so only with the consent of his superior. The vassal, however, could subfeu without any consent, but he remained liable to the superior for the prestations of the original grant until the superior accepted his disponee as a vassal in his stead. As a superior was not legally obliged to receive a disponee of a vassal, the device was adopted of giving the purchaser two deeds or charters—one with an obligation to infeft *de me*, the other with an obligation to infeft *a me de superiore meo*. On these two deeds an instrument of sasine was expede, which by its terms could be held to proceed on either. In virtue of the *de me* holding, the instrument of sasine gave the disponee a valid title to the *dominium utile*, with the seller as immediate superior. As soon as the mediate superior recognised the disponee as a vassal, the sasine was ascribed to the *a me* holding, and the deed with the obligation to infeft *de me* was dropped from the progress. In other words, the infeftment, until confirmed, gave a valid title to the property, leaving a mid-superiority in the disponer, and when confirmed extinguished the mid-superiority in the disponer, and invested

Origin of *a me vel de me* holding.

[1] Jur. Styles, vol. i., 80.

the disponee in it. Afterwards a vassal gave to his disponee, instead of two deeds, one disposition containing an obligation to infeft *a me de superiore meo vel de me*, or, as it came to be put, *a me vel de me*, and a precept of sasine applicable indefinitely to either alternative. Infeftment on this deed secured to the purchaser a feudal title to the property; and, on entry with the superior, the disponer was divested of the mid-superiority, and the disponee invested in it.[1]

Form of obligation to infeft between 1847 and 1858.

In the form of disposition in use after the Lands Transference Act, 1847, until the commencement of the Titles Act, 1858, the clause of obligation to infeft was in these terms:—"And I oblige myself to infeft the said A and his foresaids, to be holden *a me* [or *a me vel de me*, as the case might be];" and it was enacted by section 2 of the Act of 1847[2] that the clause of obligation to infeft, if the clause should be limited to an obligation to infeft *a me* only, should be held to imply an obligation on the disponer to infeft the disponee, and his heirs and assignees, in the subjects conveyed upon their own expenses, to be holden from the disponer and his heirs and successors of and under their immediate lawful superiors in the same manner as the disponer himself, or his predecessors or authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other; and that the obligation to infeft, if granted to be holden *a me vel de me*, should be held to imply an obligation on the disponer to infeft the disponee, and his heirs and successors, upon their own expenses, by two several infeftments and manners of holding, one thereof to be holden of the disponer, and his heirs and successors, in feu-blench for payment of a penny Scots in name of blench farm at Whitsunday yearly upon the ground of the lands, if asked only, and freeing and relieving him and them of all feu-duties, and other duties and services exigible out of said lands and others by their immediate lawful superiors thereof, and the other of

[1] See Bell's Lect., vol. i., 683 *et seq.*; Menzies, 637 *et seq.*

[2] 10 and 11 Vict., c. 48.

the said infeftments to be holden from the granter and his foresaids of and under their said immediate lawful superiors in the same manner as the granter, or his predecessors or authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both. After the Titles Act of 1858,[1] it was unnecessary to insert in a disposition an obligation to infeft, the holding *a me* or *a me vel de me* being expressed without the obligation to infeft; and if the lands were disponed to be holden *a me* only, or *a me vel de me*, the clause so expressing the manner of holding implied that the lands were to be held in the manner expressed in section 2 of the Lands Transference Act, 1847, with reference to obligations to infeft *a me* or *a me vel de me* respectively. Before that Act the holding implied in a disposition in which none was expressed was *a me*.[2] After the Act the holding implied was alternative, *a me vel de me*, except in two cases—(1) where there was a clause in the charter of the land prohibiting subinfeudation; or (2) where the charter prohibited an alternative holding. In these two cases the holding implied was *a me*. Since the passing of the Conveyancing Act, 1874, the expression of a holding in a disposition is unnecessary. If any is expressed, it should be a holding *a me;* for by the Act every proprietor duly infeft at the commencement of the Act or thereafter is held to be, as at the date of the registration of his infeftment, duly entered with the nearest superior whose estate of superiority would, according to the law existing prior to the commencement of the Act, have been not defeasible at the will of the proprietor so infeft.[3]

Unnecessary to insert obligation to infeft since Titles Act of 1858.

Expression of holding unnecessary since 1874.

Before the Conveyancing Act, 1874, infeftment on an *a me* holding, express or implied, until confirmed, vested no real right in the disponee. When confirmed, the disponee was feudally invested in the fee of property which remained till

The effect of an infeftment on—(1) *a me* holding until and when confirmed;

[1] 21 and 22 Vict., c. 76, sect. 5, as interpreted by 23 and 24 Vict., c. 143, sect. 36.

[2] *Buchan* v. *Jamieson*, 1678, M. 2258; *Peebles* v. *Watson*, 1825, 4 S., 290.

[3] Sect. 4.

(2.) on a *de me* holding;

then in his author.[1] Infeftment on a *de me* holding—the holding still appropriate to and expressed in feu-charters—gave the disponee a good title to the estate of property, and made him the vassal of the disponer.[2] Infeftment on an alternative holding *a me vel de me* gave a title to the property, with the disponer as superior, and when it was confirmed the disponee was vested in the property, the mid-superiority in the disponer was extinguished, and the disponee held of the disponer's superior. Therefore, so long as an infeftment on an *a me* holding was not confirmed, a second disposition of the same property, followed (1) by infeftment and confirmation, or (2) by resignation and infeftment, would carry the property from the first disponee; and so long as the infeftment of the first disponee on an *a me vel de me* holding was not confirmed, a second disponee who got his infeftment confirmed or entered by resignation and infeftment would acquire the mid-superiority remaining in the disponer, and thus constitute himself permanently the first disponee's immediate superior. The first disponee would hold of the second for an illusory duty but with untaxed casualties, and a mid-impediment would be created preventing the first disponee from making his holding public. If, however, the heir of the disponer should have made up a title to the mid-superiority, that did not create a mid-impediment to the disponer's disponee making his holding public.[3] But it ought to be pointed out that where the investiture of lands contained a prohibition against subinfeudation or against an alternative holding, and where, therefore, the implied holding, in a conveyance where no holding was expressed, was even after 1858 *a me*, the disponee had the benefit of a proviso in section 36 of the Titles Act, 1860. The proviso was that when the investiture contained such prohibition the disposition, or an instrument thereon, should, if an entry in the lands therein specified

(3.) on an *a me vel de me* holding until and when confirmed.

Risks run when confirmation required and not taken.

[1] On disposition with holding *a me*, see Menzies, 622 *et seq.*

[2] On disposition *de me*, see Menzies, 635 *et seq.*

[3] *Fullarton* v. *Hamilton*, 1833, 12 S., 117; and see *Cheyne* v. *Smith*, 1832, 10 S., 622.

or thereby conveyed were expede with the superior within twelve months from the date of such conveyance or instrument, have the same preference in all respects from the date of recording in the appropriate Register of Sasines the conveyance or instrument, as if the same contained an *a me vel de me* holding, and the investiture had not contained any prohibition against subinfeudation or against an alternative holding. But it is thought that this proviso did not protect the disponee against an entry on the part of a second *bona fide* purchaser even within the twelve months.[1]

The procuratory or clause of resignation.

The Procuratory or Clause of Resignation in favorem was a mandate by a disponer authorising the giving back of the lands to the superior in order that he might reconvey them to the disponee, to be held of the superior as the disponer held them. The procuratory or clause was impliedly abolished by the Conveyancing Act, 1874, which renders incompetent the granting of charters or writs of resignation. The form of procuratory of resignation used prior to the commencement of the Lands Transference Act, 1847, was as follows :—

> "And for completing the said infeftment by resignation, I hereby make and constitute and each of them, jointly and severally, my lawful and irrevocable procurators, with full power to them to compear before my superiors of the lands and others above disponed, or their commissioners in their names, having power to receive resignations, and to grant new infeftments thereupon, there for me and in my name to resign and surrender, as I by these presents resign, surrender, *simpliciter* upgive, overgive, and deliver, All and Whole the lands and others before disponed, all lying and described as aforesaid, and here holden as repeated *brevitatis causa*, with all right, title, and interest which I, my predecessors and authors, had, have, or could pretend thereto, in the hands of my said superiors, or their commissioners authorised as aforesaid, in favour and for new infeftment of the same, to be made and granted to the said B and his foresaids, heritably and irredeemably, in due and competent form ; acts, instruments, and documents thereupon to ask and take, and generally to do everything concerning the premises which I could have done myself, or which to the office of procuratory in such cases is known to belong ; ratifying hereby and confirming whatever my said procurators shall lawfully do or cause to be done in the premises in virtue hereof.[2]

[1] See Bell's Lect., vol. i., 688.

[2] For form see Jur. Styles (4th ed.), vol. i., 95.

The procuratory or clause of resignation introduced by the Lands Transference Act, 1847, and re-enacted by the Titles to Land Consolidation Act, 1868, was as follows:—"I resign the said lands and others for new infeftment," which was declared to be equivalent to a procuratory of resignation in the terms in use before 1847. Prior to the Conveyancing Act, 1874, a procuratory or clause of resignation was essential in a disposition if the disponee was to enter by resignation.

Precept of sasine.

The Precept of Sasine, a mandate by the disponer to give the disponee possession, was rendered unnecessary by the Titles Act, 1858, which allowed a conveyance to be recorded in the Register of Sasines, and made registration equivalent to sasine. Before the Titles Act, 1858, a precept of sasine was an essential in a disposition, if the disponee was to take infeftment in the property and enter by confirmation, and it was also an essential in a feu-charter.[1]

How disponee feudalises his title since 1874.

Completion of a Disponee's Title.—A disponee, on the assumption that his disponer is infeft, and that the lands are sufficiently described, can feudalise his title—

(1.) By recording his disposition, with a warrant of registration, in the appropriate Register of Sasines.[2]

(2.) By expeding and recording, with a warrant of registration, a notarial instrument on his disposition.[3]

If a disposition contains a clause of direction, the disponee can either record the whole disposition with a warrant in common form, or record the disposition with a warrant referring to the clause of direction, in which case only the parts of the deed directed to be recorded, along with the clause of direction, the testing clause, and the warrant of registration, will enter the record; or he can expede and, with a warrant of registration thereon, record a notarial instrument embracing the whole portions of the deed directed to be recorded.[4]

[1] See p. 22 *et seq.*
[2] 31 and 32 Vict., c. 101, sect. 5.
[3] *Ibid.*, sect. 17.
[4] 31 and 32 Vict., c. 101, sect. 12; and see further on the completion of title, p. 115.

Intervention of superior necessary until 1874.

How intervention given on entry by confirmation and resignation to disponee when disponer *entered*.

The intervention of the superior, while now unnecessary to the completion of a disponee's title, was required prior to the commencement of the Conveyancing Act, 1874. For instance, if A feued to B, who, infeft and therefore entered (for, his charter being direct from the superior, his infeftment required no confirmation), sold to C, C completed a title—(1) prior to 1st October 1845 (Infeftment Act, 1845); (2) between 1st October 1845 and 1st October 1858 (Titles to Land Act, 1858); (3) between 1st October 1858 and 31st December 1868 (Consolidation Act, 1868), and (4) between 31st December 1868 and 1st October 1874 (Conveyancing Act, 1874), by (*a*) confirmation, or by (*b*) resignation, thus:—

BY CONFIRMATION.	BY RESIGNATION.
(1.) *Prior to* 1*st October* 1845.	
1. Symbolical delivery of possession on the lands in virtue of precept of sasine in disposition B to C.	1. Charter of resignation from A on procuratory B to C.
2. Instrument of sasine narrating delivery, recorded within sixty days of its date.	2. Symbolical delivery on lands in virtue of precept in charter of resignation.
3. Charter of confirmation by A confirming disposition, and sasine in favour of C.[1]	3. Instrument of sasine recorded within sixty days.[2]
(2.) *Between* 1*st October* 1845 *and* 1*st October* 1858.	
1. Instrument of sasine on precept B to C, recorded within C's lifetime.	1. Charter of resignation from A on procuratory B to C.
2. Charter of confirmation confirming disposition (after 1847, lands[3]) and sasine in favour of C.	2. Instrument of sasine, on precept in charter, recorded within C's lifetime.

(1.) Prior to 1845.

(2.) 1845-1858.

[1] Bell's Lect., vol. ii., 731 *et seq.*; Menzies, 647.

[2] Bell's Lect., vol. ii., 737; Menzies, 667.

[3] 10 and 11 Vict., c. 48, sect. 9.

BY CONFIRMATION.	BY RESIGNATION.
(3.) 1858-1868. (3.) *Between* 1*st October* 1858 *and* 31*st December* 1868.	
1. Disposition recorded. 2. Writ of confirmation from A, written on recorded disposition, or separate charter of confirmation.[1]	1. Disposition, with writ of resignation from A thereon, recorded; or a charter of resignation, recorded.[2]
(4.) 1868-1874. (4.) *Between* 31*st December* 1868 *and* 1*st October* 1874.	
No change; but it was competent to expede and record a notarial instrument instead of recording the disposition.[3]	No change; but it was competent to expede and record a notarial instrument instead of recording the disposition.[4]

How intervention given on entry by confirmation and resignation to disponee when disponer *not entered*.

Another case may be taken. Suppose that A feued to B, who, infeft (and therefore entered), sold to C, who, infeft but not entered, sold to D, who, infeft but not entered, sold to E. E completed his title—

(1.) Prior to 1845. (1.) *Prior to* 1*st October* 1845.	
1. Symbolical delivery on precept D to E. 2. Instrument of sasine recorded within sixty days. 3. Charter of confirmation from A, confirming dispositions and sasines in favour of C, D, and E.[5]	1. Combined charter of confirmation and resignation, which confirmed dispositions and sasines in favour of C and D, and conveyed lands in virtue of procuratory D to E, made valid by confirmation. 2. Symbolical delivery in virtue of precept in combined charter. 3. Instrument of sasine recorded within sixty days.[6]

[1] 21 and 22 Vict., c. 76, sect. 7.
[2] 21 and 22 Vict., c. 76, sect. 9, and 23 and 24 Vict., c. 143, sect. 33.
[3] 31 and 32 Vict., c. 101, sects. 17, 97, and 98.
[4] 31 and 32 Vict., c. 101, sects. 17, 99.
[5] Bell's Lect., vol. ii., 731 *et seq.*; Menzies, 657 *et seq.*
[6] Bell's Lect., vol. ii., 744; Menzies, 650.

BY CONFIRMATION.	BY RESIGNATION.
(2.) *Between* 1*st October* 1845 *and* 30*th September* 1847. (*Lands Transference Act*).	(2.) 1845-1847.
1. Instrument of sasine on precept D to E, recorded within E's lifetime. 2. Charter of confirmation, confirming dispositions and sasines in favour of C, D, and E.[1]	1. Combined charter of confirmation and resignation, which confirmed dispositions and sasines in favour of C and D, and disponed lands in virtue of procuratory D to E, made valid by confirmation. 2. Instrument of sasine on precept in combined charter, recorded within E's lifetime.[2]
(3.) *Between* 30*th September* 1847 *and* 1*st October* 1858.	(3.) 1847-1858.
1. Instrument of sasine on precept D to E, recorded. 2. Charter of confirmation, confirming lands and sasine in favour of E.[3]	No change.
(4.) *Between* 1*st October* 1858 *and* 31*st December* 1868.	(4.) 1858-1868.
1. Disposition recorded. 2. Writ of confirmation from A written thereon, or separate charter of confirmation.[4]	1. Disposition, with writ of resignation from A written thereon, recorded; or, till 1860, a combined charter of confirmation and resignation, and, after 1860, a charter of resignation recorded.[5]
(5.) *Between* 31*st December* 1868 *and* 1*st October* 1874.	(5.) 1868-1874.
No change; but it was competent to expede and record a notarial instrument instead of recording the disposition.[6]	No change; but it was competent to expede and record a notarial instrument instead of recording the disposition.[7]

[1] Bell's Lect., vol. ii., 731 *et seq.*; Menzies, 667 *et seq.*

[2] Bell's Lect., vol. ii., 744; Menzies, 650.

[3] 10 and 11 Vict., c. 48, sect. 9.

[4] 21 and 22 Vict., c. 76, sect. 7.

[5] 21 and 22 Vict., c.76, sect. 9; and 23 and 24 Vict., c. 143, sects. 33, 39.

[6] 31 and 32 Vict., c. 101, sects. 17, 97, and 98.

[7] 31 and 32 Vict,, c. 101, sects. 17 and 99.

How split created and remedied.

In this case E might also, prior to 1874, have made up a separate title to the property and a separate title to the mid-superiority. For example, he might, say in 1872, have recorded the disposition in his favour, which would have infeft him in the property, and then have obtained a charter of resignation from A on the procuratory granted by B to C, which was carried to E by the assignation to writs in the different dispositions, and recorded it, which would have divested B of the mid-superiority remaining in him, and invested E in it.[1] He would then have required to consolidate the fees of property and mid-superiority. Splits of property and mid-superiority will not now be created, but where already created they may require to be remedied.

In addition to the use of the combined charter of resignation and confirmation, shown above, it could also be employed prior to 1874 in a case such as the following:—If A, infeft but unentered, sold to B, B might take infeftment, and then get from his superior a combined charter of resignation and confirmation confirming the dispositions and sasines in favour of A and of himself, and proceeding on the procuratory in his favour by A, and take infeftment on the charter. This method gave B a double title, one by confirmation and one by resignation, but it created no split.[2]

Difference between entry by resignation and by confirmation.

Some remarks may here be made on the difference between entry by resignation and entry by confirmation, and the different changes made by successive Acts on these methods of entry.

A disponee could demand entry by resignation since 1747, and by confirmation, or either way, since 1847.

Not till 1747[3] could heirs and singular successors compel a superior to grant entry by resignation. Not till 1847[4] could heirs and singular successors compel an entry by confirmation. In practice entry by confirmation or by resignation was granted long before 1747.[5]

Principle of resignation.

In the case of resignation there was a giving back to the

[1] See Bell's Lect., vol. ii., 747.

[2] See *Stewart* v. *Earl of Fife*, 1827, 5 S., 383; *Campbell* v. *Huldane*, 1754, 5 Br. Sup., 809; Bell's Lect., vol. ii., 743.

[3] 20 Geo. II., c. 50.

[4] 10 and 11 Vict., c. 48, sect. 6.

[5] Menzies, 629 *et seq.*

superior of the lands, not in order that he might retain them, but that he might of new dispone them. In virtue of the giving back to him of the lands by the clause of resignation in the disposition, he granted a charter of resignation to the holder of the disposition. The charter of resignation[1] contained, *inter alia*, a dispositive clause, and till 1858 a precept of sasine, and on the precept of sasine the grantee of the charter took infeftment, and his title was thus completed. A maxim strictly observed was that an unentered vassal could not grant a valid procuratory of resignation, resignation being only competent by a vassal in the hands of his own immediate superior.

A valid procuratory could only be granted by an entered vassal.

Entry by resignation was the more closely allied to the principles of the feudal system; but entry by confirmation was the more common mode in practice. The disponee, in entering by confirmation, took infeftment on the precept in the disposition in his favour, and then got his infeftment recognised by the superior in a charter[2] or writ of confirmation.[3] The disponee by his base infeftment, if his holding, express or implied, was *a me vel de me*, secured, as has been pointed out, a feudal title to the property; and he could get a charter or writ of confirmation to make his base holding public when he desired, or when he was forced to do so. As a superior was entitled to payment of a casualty on granting a charter or writ of resignation, or charter or writ of confirmation, and as he was not able to enforce payment of a casualty till the death of the last-entered vassal, disponees often found it of pecuniary advantage, instead of entering at once by resignation, to take base infeftment on their disposition, and thereby acquire a feudal title to the property, and afterwards on the death of the last entered vassal to enter with the superior by confirmation. Confirmation operated *retro* so as to make the infeftments confirmed

Entry by confirmation.

Advantages of entry by confirmation.

[1] For form see Jur. Styles (4th edition), vol. i., 406; and 31 and 32 Vict., c. 101, schedule (V), No. 4.

[2] For form see Jur. Styles (4th edition), 413; and 31 and 32 Vict., c. 101, schedule (V), No. 2.

[3] For form see 31 and 32 Vict., c. 101, schedule (V), No 1.

real rights holden of the superior, granting the confirmation as from their date, and that although a party whose infeftment was confirmed had died prior to the granting of confirmation.[1] By confirmation the superior was excluded from demanding casualties falling due between the date of the infeftment and the date of the confirmation, although prior to confirmation he might have claimed these;[2] but although a superior had granted a charter of resignation he was not thereby precluded from exacting casualties emerging before infeftment was taken on it.[3]

Steps in entry by resignation.

The steps in entry by resignation were—

1. Disposition to disponee containing procuratory or clause of resignation.
2. Charter of resignation, or writ of resignation written on disposition.
3. Infeftment.

Steps in entry by confirmation.

The steps in entry by confirmation were—

1. Disposition to disponee.
2. Infeftment.
3. Charter of confirmation or writ of confirmation written on the recorded deed. Neither the charter nor the writ was recorded.

Changes in entry by resignation:

(1.) By Titles Act, 1858;

(2.) By Titles Act, 1860;

(3.) By conveyancing Act, 1874.

As regards the method of entry by resignation, it is necessary to notice the changes made by several Acts. (1.) The Titles to Land Act, 1858, while not abolishing charters of resignation, introduced writs of resignation which were held to operate as a confirmation of all prior deeds necessary to be confirmed in order to complete the investiture.[4] (2.) The Titles to Land Act, 1860, enacted that charters of resignation should operate confirmation of all prior deeds necessary to be confirmed.[5] (3.) The Conveyancing Act, 1874, abolished charters and writs of resignation.[6]

[1] *M'Dowall* v. *Houston and Hamilton*, 1793, M. 8807; *Lockhart* v. *Ferrier*, 1837, 16 S., 76; and see *Duke of Argyll* v. *Dalgleish's Trustees*, 1873, 11 Macph., 616; Menzies, 634.

[2] Menzies, 633.

[3] *Ibid.*, 634.

[4] 21 and 22 Vict., c. 76, sect. 7.

[5] 23 and 24 Vict., c. 143, sect. 39.

[6] 37 and 38 Vict., c. 94, sect. 4.

As regards the method of entry by confirmation, these changes may be noted:—(1.) The Lands Transference Act, 1847,[1] made it sufficient for the charter of confirmation to confirm the lands and sasine in favour of the person receiving the charter. Previous to the Act the charter confirmed either the lands with the disposition or series of dispositions connecting the new proprietor with the last vassal and the sasine or sasines thereon, or simply the disposition or series of dispositions connecting the new proprietor with the last vassal and the sasine or sasines thereon.[2] (2.) The Titles to Land Act, 1858,[3] introduced writs of confirmation which operated confirmation of all writs requiring to be confirmed. (3.) The Conveyancing Act, 1874,[4] abolished charters and writs of confirmation.

Changes in entry by confirmation:

(1.) By Lands Transference Act, 1847;

(2.) By Titles Act, 1858;

(3.) By Conveyancing Act, 1874.

As regards the use of the combined charter of resignation and confirmation, the Titles to Land Act, 1858, declared that writs of resignation should operate confirmation of all prior deeds; and the Titles to Land Act, 1860, declared that charters of resignation should have the same effect,—and therefore the combined charter was superseded by the writ or charter of resignation. When the combined charter was used before the Titles Act of 1860 it specifically confirmed all unconfirmed writs, as it was not in any way affected by the provision of the Lands Transference Act of 1847, that a charter of confirmation confirming the lands and last sasine operated as confirmation of all deeds necessary to be confirmed for the completion of title.

Combined charter of resignation and confirmation unnecessary since 1858 and 1860.

Without regard to the time when lands were feued, renewal of investiture was abolished by the Conveyancing Act of 1874.[5] It is, since 1st October 1874, unnecessary for a vassal to obtain, and incompetent for a superior to grant, any charter, precept, or other writ by progress—infeftment implying entry

Renewal of investiture abolished.

[1] 10 and 11 Vict., c. 48, sect. 7.
[2] Bell's Lect., vol. ii., 733.
[3] 21 and 22 Vict., c. 76, sects. 6, 7.
[4] 37 and 38 Vict., c. 94, sect. 4.
[5] Sect. 4 (1).

Writs by progress.

with the superior, whether the superior's title is complete or not; but the Act does not prevent the granting of—(1) charters of *novodamus;* or (2) precepts or writs of *clare constat;* or (3) writs of acknowledgment. Among the writs which the Act makes it incompetent to grant are—(1) charters and writs of resignation; (2) charters and writs of confirmation; (3) combined charters of resignation and confirmation; (4) charters of adjudication, &c.[1]

[1] See Begg's Conveyancing Code, 303; Sturrock's Analysis, 20.

CHAPTER IV.

DISPOSITION OF SUPERIORITY; CONSOLIDATION.

Peculiarities of a disposition of superiority.

In a disposition of superiority to a stranger, or to a vassal holding the *dominium utile*—

(1.) The disponer is generally described as superior, not heritable proprietor; and the *dominium directum*, or, as is more correct, the lands, are disponed.

(2.) The feu and blench duties and casualties, instead of rents, are assigned; and

(3.) The clause of warrandice excepts feu-rights, not leases.

In other respects, a disposition of superiority is the same in its terms as a disposition of property.[1]

How disponee takes infeftment.

A disponee of a fee of superiority prior to 1874 completed and now completes his title in the same way as a disponee of property.[2]

What is consolidation.

Consolidation.—When the same person holds the *dominium directum* and the *dominium utile* of the same estate on different titles, he generally unites, or, in technical language, consolidates them.

How consolidation effected by a vassal succeeding to *dominium directum.*

When a feudal proprietor of the *dominium utile* obtained or obtains a disposition of the *dominium directum*, he completed or completes his title thereto, and thereafter consolidated or consolidates the fees of superiority and property in the way set forth in the following table.

[1] Jur. Styles, vol. i., 112. [2] See p. 140.

I. *Before* 1*st October* 1858, *the commencement of the Titles Act*, 1858.

1. Procuratory of resignation *ad remanentiam* in favour of himself.
2. Instrument of resignation *ad remanentiam* signed by notary and witnesses on each page, recorded within sixty days of its date.

II. *Between* 1*st October* 1858 *and* 1*st October* 1874, *the commencement of the Conveyancing Act*, 1874.

Procuratory of resignation *ad remanentiam* recorded within his lifetime.[1]

III. *After* 1*st October* 1874.

1. Minute of consolidation recorded;[2] or
2. Procuratory of resignation *ad remanentiam* recorded.[3]

Superior succeeding to *dominium utile*.

Peculiarities of disposition to superior—

(1.) Before 1847;

(2.) 1847-1858;

(3.) 1858-1874;

(4.) After 1874.

When the superior purchased the property from his vassal, the disposition in his favour contained—(1) before the commencement of the Lands Transference Act, 1847, a procuratory of resignation *ad remanentiam;* (2) between 1st October 1847 and 1st October 1858 a simple clause of resignation, which, in a deed in the superior's favour, was held to be a clause of resignation *ad remanentiam;*[4] (3) between 1st October 1858 and 1st October 1874 a clause of resignation *ad remanentiam.*[5] (4) The disposition after 1st October 1874 may or may not contain a clause of resignation *ad remanentiam.* The disposition in favour of the superior never required either an obligation to infeft or a precept of sasine.[6]

How consolidation effected by a superior succeeding to *dominium utile:*

After obtaining the disposition of property, the superior, to infeft himself in the property as well as to consolidate the superiority and the property fees, would proceed thus:—

[1] 21 and 22 Vict., c. 76, sect. 4.
[2] 37 and 38 Vict., c. 94, sect. 6.
[3] *Ibid.*
[4] 10 and 11 Vict., c. 48, sect. 1, schedule A.
[5] 21 and 22 Vict., c. 76, sect. 5; 31 and 32 Vict., c. 101, sect. 8.
[6] Bell's Lect., vol. ii., 780.

I. *Before* 1*st October* 1845, *the commencement of the Infeftment Act*, 1845— (1.) Before 1845;

1. Symbolical resignation (by pen) of feu by vassal's attorney to superior or his commissioner having special power to receive resignation, before notary and two witnesses.
2. Instrument of resignation *ad remanentiam*, signed by notary and witnesses on each page, recorded within sixty days of its date.[1]

II. *After* 1*st October* 1845 *to* 1*st October* 1858. (2.) 1845-1858;

1. Symbolical delivery to superior, or his known agent, or person having commission for that purpose.
2. Instrument of resignation *ad remanentiam*, signed by notary and witnesses on each page, recorded within sixty days of its date.[2]

III. *After* 1*st October* 1858 *to* 31*st December* 1868. (3.) 1858-1868;

Disposition, if it contained an express clause of resignation *ad remanentiam*, recorded at any time during lifetime of superior,[3] or (if the case admitted) a notarial instrument, instead of the disposition, could be recorded.

IV. *After* 31*st December* 1868 *to* 1*st October* 1874. (4.) 1868-1874;

1. Disposition containing an express clause of resignation *ad remanentiam*, recorded; or
2. Notarial instrument, recorded.[4]

Note that if infeftment was taken after 1858 on a conveyance granted before 1858, and containing a clause of resignation in the form authorised by the

[1] Bell's Lect., vol. ii., 781.
[2] 8 and 9 Vict., c. 35, sect. 8.
[3] 21 and 22 Vict., c. 76, sect. 4.
[4] 31 and 32 Vict., c. 101, sect. 18.

Lands Transference Act, 1847, an instrument of resignation *ad remanentiam* had to be expede and recorded. It has been assumed in what has been said above of consolidation by the superior in his own favour that the disposition of the property to him contained a clause of resignation. If it did not contain such a clause, then he, after completing *habili modo* a title to the property conveyed to him by the disposition, would consolidate the fees of superiority and property by the methods set forth in the table on page 150.

(5.) After 1874.

V. *After 1st October* 1874.

1. If disposition contains no clause of resignation *ad remanentiam*, the disposition, or a notarial instrument, is recorded, to give a feudal title to the property; and then, to effect consolidation of the superiority and the property, a minute of consolidation or a procuratory of resignation is recorded;[1] or,
2. If disposition contains a clause of resignation *ad remanentiam*, the recording of it, or a notarial instrument, will give a title to the property, and effect consolidation.

(1) A clause of resignation *ad remanentiam*; (2) an instrument of resignation, *ad remanentiam*; and (3) a procuratory of resignation, can still be used.

It is thought that (1) a clause of resignation *ad remanentiam* in a disposition of property by a vassal to a superior; (2) an instrument of resignation *ad remanentiam*; and (3) a procuratory of resignation, can still be used. In view, however, of the terms of the Conveyancing Act, 1874, sections 4, 6, 26, it will be better not to make use of them. After titles have been made up to both property and superiority, the two fees should be consolidated by recording a minute of consolidation. This method should be resorted to whether a

[1] 31 and 32 Vict., c. 101, sect. 6.

superior acquires a right to the property or mid-superiority of land, or whether a proprietor of the property or of the mid-superiority acquires a right to the superiority. There is one other method of consolidation—consolidation by prescription. If the superiority infeftment contains the lands, and if the lands as well as the superiority are possessed on such infeftment for the prescriptive period, consolidation will be effected by prescription.[1]

Effect of consolidation.

When consolidation of a fee of superiority and a fee of property takes place, the destination of the property becomes merged in that of the superiority.[2] But when a fee of superiority is entailed, and the heir of entail in possession acquires the fee of property and consolidates the two fees, the fee of property, notwithstanding the consolidation, can be re-issued by the heir of entail who purchased it, or by a succeeding heir of entail, at least so long as prescription has not run.[3]

In the case of the *Earl of Zetland* v. *Glover Incorporation of Perth*,[4] where a base right to land with salmon fishings was resigned *ad remanentiam* into the hands of the superior, who had no title to salmon fishings, it was held that consolidation had not extinguished the right to salmon fishings, and that the superior had a right to them although the title to the superiority contained no mention of salmon fishings.

[1] *Middleton and Paterson* v. *Earl of Dunmore*, 1774, M. 10,944 ; *Lord Elibank* v. *Campbell and Purves*, 1833, 12 S., 74 (with which compare *Earl of Glasgow* v. *Boyle*, 1887, 14 R., 419) ; *Bontine* v. *Graham*, 1837, 15 S., 711, aff. 1840, 1 Rob. App., 347 ; *Wilson* v. *Pollok*, 1839, 2 D., 159 ; *Dalrymple* v. *Earl of Stair*, 1841, 3 D., 837.

[2] See *Pattison* v. *Dunn's Trustees*, 1866, 4 Macph., 1104, aff. 1868, 6 Macph. (H.L.), 147 ; and *Park's Curator* v. *Black*, 1870, 8 Macph., 671.

[3] *Heron* v. *Duke of Queensberry*, 1733, 1 Pat. App., 93 ; *Galbraith* v. *Graham*, Jan. 14, 1814, F.C.

[4] 1868, 6 Macph., 292 ; 1870, 8 Macph. (H.L.), 144.

CHAPTER V.

ASSIGNATIONS OF UNRECORDED CONVEYANCES.

How an unfeudalised deed was transferred prior to 1858.

THE holder of an unfeudalised conveyance or deed could transfer his right under it, prior to the Titles Acts of 1858 and 1860, by a disposition and assignation. The disposition and assignation transferred the unfeudalised title and the lands therein, and specially assigned the unexecuted warrants—*i.e.*, the procuratory or clause of resignation and precept of sasine in it. In virtue of these unexecuted warrants made over to him, the assignee was able to make up a feudal title to the lands.[1] Thus, if A, whose title was feudally complete, sold lands to B, who, without making up a feudal title, sold to C prior to 1858, C, on obtaining a disposition and assignation from B, could enter with the superior either (1) by confirmation or (2) by resignation, as follows :—

BY CONFIRMATION.	BY RESIGNATION.
1. Instrument of sasine on precept by A to B, assigned by B to C.	1. Charter of resignation on procuratory by A to B, assigned by B to C.
2. Charter of confirmation confirming lands and sasine in favour of C.	2. Instrument of sasine on precept in charter of resignation.

How an unfeudalised title may now be assigned.

The disposition and assignation was not abolished, but superseded, by the introduction of an assignation by the Titles to Land Act, 1858,[2] as regards lands not held burgage, and by the Titles to Land Act, 1860,[3] as regards lands held burgage.

[1] Menzies, 655.
[2] 21 and 22 Vict., c. 76, sect. 13.
[3] 23 and 24 Vict., c. 143, sect. 9.

The Titles Acts of 1858 and 1860 were abolished, but the provisions of the sections referred to were re-enacted, with some additions, by section 22 of the Titles to Land Consolidation Act, 1868.[1] That section makes it competent to any person having right to an unrecorded deed or conveyance, whether granted in favour of himself or originally granted in favour of another person, to transfer the deed or conveyance by assignation. The assignation—which may be (*a*) apart from the deed or conveyance assigned (No. 1 of schedule M); or (*b*) written on it (No. 2 of schedule M)—sets forth the deed or conveyance and the title or series of titles, if any, by which the cedent acquired right to the same, and the nature of the right assigned.

How assignee feudalises his title—1868 Act.

The assignee can under the Act complete his title in one of three methods :—

(1.) By recording the assigned deed or conveyance, with a warrant of registration in his favour, and the assignation or assignations thereof. If the assignation or assignations are apart from the assigned deed, they require to be docqueted with reference to the warrant of registration written on the deed or conveyance; but if the assignation or assignations are written on the assigned deed they do not require such a docquet.[2]

(2.) By recording the deed or conveyance, with a warrant of registration in his favour, and a notarial instrument (schedule N) docqueted with reference to the warrant of registration. The notarial instrument in this mode sets forth the deed or conveyance, the title or series of titles by which he acquired right to the same, and the nature of his right.[3]

(3.) By recording, with a warrant of registration in his favour, a notarial instrument (schedule J). The notarial instrument sets forth generally the nature

[1] 31 and 32 Vict., c. 101, sect. 22.
[2] *Ibid.*
[3] Sect. 23.

of the assigned deed, and contains those portions of the assigned deed by which the lands are conveyed, and by which real burdens, conditions, provisions, or limitations, if any, are imposed, and also sets forth the title or series of titles by which the assignee acquired right to it.[1]

The first of these modes is apparently confined to the case when the transmissions are assignations in the form of schedule (M) of the Titles to Land Consolidation Act, 1868. The other two modes are not so confined.[2]

Transmission of personal right under Conveyancing Act, 1874, sect. 9.

It may be well to point out that a person having a personal right to lands, in virtue of section 9 of the Conveyancing Act, 1874, can transmit it in the same manner as a personal right to land under an unfeudalised conveyance. But, as will be shown hereafter, the assignee, to complete his title, must present a petition under section 10 of the Act.

An unfeudalised title to lands is not to be confounded with a *jus crediti* to them. If the former is assigned to two persons, the one who first takes infeftment has right to the lands;[3] but if the latter is assigned to two persons, the one who first intimates his assignation is preferred in a competition.[4]

[1] Sect. 23.
[2] See Jur. Styles, vol. i., 115.
[3] *Bell* v. *Gartshore*, 1737, M. 2848.
[4] See *Edmond* v. *Magistrates of Aberdeen*, 1855, 18 D., 47; aff. 1858, 3 Macq. App., 116.

CHAPTER VI.

BURGAGE SUBJECTS.

Since the Conveyancing Act, 1874, came into operation, there has been no distinction between estates in land held burgage and estates in land held feu, in so far as regards (1) the conveyances relating thereto; (2) the completion of titles; or (3) any of the matters or things to which the provisions of the Act relate.[1] Conveyancing Act and burgage subjects.

Formerly a disposition of burgage property differed from a disposition of feudal subjects. Prior to the Titles to Land Act, 1860,[2] the former had (1) an obligation to infeft, which was not *a me vel de me*, but to be holden of Her Majesty in free burgage; and (2) an obligation to free and relieve of all cess, annuity, ground-annual, and other public and parochial burdens, instead of all feu-duties, casualties, and public burdens. A disposition of burgage property never had a precept of sasine, entry by confirmation being incompetent. By the Titles Act of 1860,[3] it was made unnecessary to insert either (1) an obligation to infeft, or (2) a procuratory or clause of resignation. Former disposition of burgage subjects: Prior to 1860. After 1860.

Conveyances of land held burgage prior to the Conveyancing Act may now be—(1) in the forms (which express the manner of holding to be of Her Majesty in free burgage, and oblige the seller to relieve his disponee of ground-annual, cess, annuity, &c.) allowed by section 7 of the Titles to Land Consolidation Act, 1868, in regard thereto, but any Form in use since 1874.

[1] 37 and 38 Vict., c. 94, sect. 25.
[2] 23 and 24 Vict., c. 143.
[3] Sect. 6; repealed by 31 and 32 Vict., c. 101, sect. 7.

procuratory or clause of resignation will be held *pro non scripto;* or (2) in the forms applicable to feudal subjects.[1]

How disponee feudalised his title:

If A, infeft in burgage subjects, disponed or dispones to B, B, after getting a disposition from A, made or makes up his title as set forth in the following table:—

(1.) Prior to 1845;

I. *Prior to Infeftment Act,* 1845.[2]

1. Resignation in the hands of a magistrate, and symbolical delivery of earth and stone by him on the ground of the subjects.
2. Instrument of resignation and sasine, attested by the town-clerk as a notary, and recorded within sixty days of its date in the burgh register.

(2.) 1845-1847;

II. *After* 1845 *till Lands Transference Burgage Act,* 1847.[3]

1. Resignation in the hands of a magistrate, and symbolical delivery on the ground of the subjects as before 1845; or within the council chamber of the burgh, by delivery of a pen.
2. Instrument of sasine, attested by town-clerk as a notary (without the addition of a long docquet formerly in use), and recorded within sixty days of its date.[4]

(3.) 1847-1860;

III. *After* 1847 *till the Titles Act,* 1860.

Instrument of sasine by town-clerk, being a notary, recorded in the burgh register at any time during the lifetime of the disponee.[5] Prior to 1847 each page of the instrument of sasine was signed by the two witnesses; but after 1847 the witnesses only required to sign the last page.

[1] 37 and 38 Vict., c. 94, sect. 26.
[2] 8 and 9 Vict., c. 35.
[3] 10 and 11 Vict., c. 49.
[4] 8 and 9 Vict., c. 35, sect. 7.
[5] 10 and 11 Vict., c. 49, sects. 5, 6, 7.

IV. *After* 1860 *till the Titles to Land Consolidation Act,* 1868.[1] (4.) 1860-1868;

1. Disposition with warrant of registration recorded in the burgh register;[2] or,
2. If the disposition was for further purposes and objects, or conveyed separate lands or separate interests in the same lands—(*a*) it could be recorded, or (*b*) a notarial instrument could be expede thereon and recorded.[3]

V. *From* 1868 *till the Conveyancing Act,* 1874. (5.) 1868-1874;

As before 1868; but a notarial instrument could be expede on any conveyance.[4]

VI. *After the Conveyancing Act,* 1874. (6.) After 1874.

As after 1868. Accordingly a disponee can now complete his title—

1. By recording his disposition with a warrant of registration in the burgh register; or,
2. By expeding and recording, with a warrant of registration, a notarial instrument on his disposition.

If there is a clause of direction in the disposition, the warrant of registration may refer thereto, and then the part or parts directed to be recorded, the clause of direction, the testing clause, and the warrant of registration, will be recorded. It has been competent since 1860[5] to insert a clause of direction in a disposition of burgage subjects.

The proper vassal in a burgage holding being the whole community, which, in a legal sense, never dies, the casualties of relief, composition, &c. were not exigible in respect of the holding; and until the passing of the Conjugal Rights Act, 1861,[6] terce was not due from burgage subjects.

[1] 31 and 32 Vict., c. 101.
[2] 23 and 24 Vict., c. 143, sect. 3.
[3] *Ibid.*, sect. 4.
[4] 31 and 32 Vict., c. 101, sect. 17.
[5] 23 and 24 Vict., c. 143, sect. 5.
[6] 24 and 25 Vict., c. 86, sect. 12.

Completion of title under an assignation to unfeudalised deed.

An assignee to an unfeudalised deed, conveying subjects held burgage prior to 1874, completes a title in the same way as an assignee to an unfeudalised deed of feudal subjects.[1]

Burgage subjects can be feued.

It is now competent to grant feus of burgage subjects, but the titles of such feus, as well as all writs affecting land, which immediately before the Act was held by burgage tenure, must be recorded in the Burgh Register. Feus granted before the Conveyancing Act are by that Act made unchallengeable, whether the feu writs were recorded (*a*) in the Register of Sasines, as they usually were, or (*b*) in the Burgh Register.[2]

Tenure of booking.

What has been said of burgage subjects applies to lands in the burgh of Paisley held by the tenure of booking. These lands can now be feued, and all writs affecting them are recorded in the Register of Booking kept in Paisley.[3]

[1] See p. 155.
[2] 37 and 38 Vict., c. 94, sect. 25.
[3] *Ibid.*

CHAPTER VII.

JUDICIAL TRANSMISSION *INTER VIVOS* OF LAND.

I. Trust-Deed for Creditors.

Trust-disposition for creditors.

To avoid the expense of a sequestration, a debtor in embarrassed circumstances may grant a trust-disposition for behoof of his creditors. In the trust-disposition he dispones to a trustee or trustees named his whole heritable estate, or, it may be, his heritable estate described either particularly or by reference in statutory form. If the estate is not described in the trust-disposition, the trustee or trustees complete a title thereto by recording a notarial instrument in the form of schedule (L) of the Titles to Land Consolidation Act, 1868. If the estate is described particularly or by reference in statutory form, the trustee or trustees will complete a title thereto by recording either the trust-disposition or a notarial instrument. If the truster's title is not feudalised, the trust-disposition will be treated as an assignation to it.

Radical right remains in truster.

Notwithstanding the trust-disposition, the radical right to the estate remains in the truster. Therefore, if any part of the estate remains unsold after the purposes of the trust have been executed, the truster requires no reconveyance of such part; and the truster's heir makes up a title, not by conveyance from the trustee, which would not vest anything in him, but as if the trust did not exist.[1]

Heir makes up title as if there had been no trust.

II. Trustee on Sequestrated Estate.

The effect of the act and warrant in favour of the trustee on a sequestrated estate is *inter alia* to vest the heritable as well as the moveable estate of the bankrupt in the trustee, subject, however, to all such preferable securities as existed at the date of the sequestration and are not null or reducible.[2]

[1] *Gilmour* v. *Gilmours*, 1873, 11 Macph., 853, and see *Edderline's Creditors*, 1801, M., *voce* Adjudication, App. No. 11.

[2] 19 and 20 Vict., c. 79, sect. 102.

The trustee, without making up a title to the heritable estate, may, without the consent of the bankrupt, grant conveyances thereof. These conveyances are as effectual to the purchaser as if they had been granted by the bankrupt with concurrence of the trustee.[1]

The trustee may make up a title to the heritable estate (not including heritable securities and long leases), if he desires to do so, in these ways:—

IF BANKRUPT'S TITLE FEUDALISED.	IF BANKRUPT'S TITLE UNFEUDALISED.
(1.) *With Intervention of Bankrupt.*	
1. By getting a disposition from bankrupt; and (*a*) by recording it, or (*b*) by expeding and recording notarial instrument thereon.[2]	1. By getting an assignation from the bankrupt; and (*a*) by recording the bankrupt's title and the assignation, or (*b*) by recording the title and a short notarial instrument, or (*c*) by recording a notarial instrument setting forth the transaction.[3]
(2.) *Without Intervention of Bankrupt.*	
1. By expeding and recording a notarial instrument in the form of schedule (O) of the Consolidation Act.[4]	1. By expeding and recording a notarial instrument in the form of schedule (O) or of schedule (J) of the Consolidation Act.[5] 2. By recording the conveyance in favour of the bankrupt, with a warrant of registration in favour of the trustee, along with a notarial instrument in the form of schedule (N) of the Consolidation Act, docqueted with reference thereto.[6]

[1] 19 and 20 Vict., c. 79, sect. 105.
[2] 31 and 32 Vict., c. 101, sects. 15, 17.
[3] Sects. 22, 23.
[4] Sect. 25.
[5] Sects. 23, 25.
[6] Sect. 23.

Heritable securities: (1.) When bankrupt's title recorded or personal;

A trustee may also complete a title to heritable securities, with or without the intervention of the bankrupt. A trustee, without such intervention, may complete a title to heritable securities to which the bankrupt has either a recorded or a personal title by recording a notarial instrument in the form of schedule (LL) of the Consolidation Act, 1868.[1] If the bankrupt's title is personal, the trustee, using his act and warrant as an assignation to the unrecorded bonds, can also complete his title by recording the unrecorded bond, with a warrant of registration in his own favour, along with a notarial instrument, docqueted with reference thereto, or by recording a notarial instrument, setting forth the whole transaction.[2]

(2.) When personal.

Long Leases.

It is competent for a trustee on a sequestrated estate to make up a title to a long lease, or an assignation in security of a long lease, under the Registration of Leases Act, 1857, by recording a notarial instrument in the form of schedule (F) of the Act.[3]

Why advisable for a trustee to make up a title to bankrupt's estate.

Although a trustee can convey the bankrupt's estate without making up a title thereto, it is advisable for him to make up a title. Prior to the sequestration, the bankrupt may have granted conveyances or heritable securities on which no infeftment or an inept infeftment may have been taken. If the trustee takes infeftment before the holder of these deeds he obtains a preferable title. Besides, a title ought to be made up in the person of the trustee, not of the bankrupt; for if the bankrupt, prior to sequestration, and whilst he had no infeftment, or an inept infeftment, granted dispositions or heritable securities which have been recorded, and if a valid feudal title is made up in the person of the bankrupt by the trustee, the holders of these deeds will acquire a preferable title by accretion.

Title should be made up in the trustee's name.

[1] 31 and 32, Vict., c. 101, sect. 25.
[2] *Ibid.*, sect. 23.
[3] 20 and 21 Vict., c. 26, sect. 11.

III. Liquidators of Joint Stock Companies.

How they make up a title.

By the Titles to Land Consolidation Act, 1868,[1] liquidators of Joint Stock Companies under the Companies Acts of 1862 and 1867, can make up a title to lands held by the company by recording a notarial instrument in the form of schedule (O) of the Act, and to heritable securities by recording a notarial instrument in the form of schedule (LL) of the Act. These forms can be used whether the company holds by a feudal or a personal title. If the company holds by a personal title, the liquidator can also make up a title under section 23 of the Act, using as an assignation the appointment in his favour.

IV. Adjudgers.

1. *Of Land.*

By the Conveyancing Act, 1874,[2]—

(1.) A decree of adjudication, whether for debt or in implement; or,

(2.) Decree of constitution or adjudication, whether for debt or in implement, if obtained in the form prescribed by the Titles to Land Consolidation Act, 1868, or obtained, if prior to the commencement of that Act, in the form then in use; or,

(3.) Decree of declarator and adjudication; or,

(4.) Decree of sale;

has (except in the case where the subjects contained in the decree are heritable securities), the effect of a conveyance in ordinary form of the lands therein contained, and the holder of such a decree, *if the person whose lands are adjudged or judicially sold was infeft,* can complete a feudal title—

If debtor infeft.

(*a.*) By recording the decree with a warrant of registration;[3] or,

(*b.*) By recording a notarial instrument on the decree.[4]

If debtor in a position to complete a feudal title.

The holder of such a decree, *if the person whose lands are adjudged or judicially sold was not infeft,* uses the

[1] Sect. 25.
[2] Sect. 26.
[3] 31 and 32 Vict., c. 101, sect. 25.
[4] *Ibid.*, sect. 17.

decree as an assignation or as one of a series of assignations of an unrecorded conveyance, and he therefore can complete his title—

(*a.*) By recording the unfeudalised title with a warrant of registration in his own favour along with a notarial instrument in the form of schedule (N), docqueted with reference thereto,—Titles to Land Consolidation Act, 1868, section 23; or,

(*b.*) By recording a notarial instrument in the form of schedule (J), *ibid.* section 23.

2. *Of Heritable Securities.*

By section 65 of the Conveyancing Act, 1874, a holder of a—

(1.) Decree of adjudication, whether for debt or in implement; or,

(2.) Decree of constitution and adjudication, whether for debt or in implement; or,

(3.) Decree of declarator and adjudication;

where the subjects contained in any such decree are heritable securities, and whether the person whose right to the securities has been adjudged had a feudalised or a personal title, can complete his title to such securities by recording in the Register of Sasines—

(*a.*) The abbreviate of adjudication; or,

(*b.*) An extract of such decree.

Where, however, the person whose right to a heritable security has been adjudged was not infeft, it is better to treat the decree as an assignation, and to complete the adjudger's title by recording a notarial instrument under section 23 of the Consolidation Act, 1868.

V. Division of Commonty, or of Common Property, or of Runrig Lands.

By section 35 of the Conveyancing Act, 1874, a decree of division—

(1.) Of commonty; or,
(2.) Of common property; or,
(3.) Of runrig lands;

whether pronounced by a court of law, or by arbiters, or by an oversman, is equivalent to a conveyance containing assignations of writs by all the joint proprietors. If the joint proprietors are infeft, infeftment may be taken in virtue of the decree by recording it with a warrant of registration in the Register of Sasines. If the proprietors are not infeft, the decree is treated as an assignation or one of a series of assignations of an unrecorded conveyance or of a personal right under section 9 of the Act.

VI. Sale of Glebe.

By section 36 of the Conveyancing Act, 1874, a decree of sale obtained in terms of section 17 of "The Glebe Lands (Scotland) Act, 1866," has the effect of a conveyance by the minister of the parish, at the sight of the heritors of the parish, and of the presbytery of the bounds, to the heritor in whose favour it is pronounced, of the glebe or portion of glebe therein contained. To complete a feudal title to the glebe or the part of the glebe described in the decree, an extract of the decree is recorded in the Register of Sasines.

DIVISION II.

CHAPTER I.

TERMS DESCRIPTIVE OF HEIRS; INSTITUTES AND SUBSTITUTES; DESTINATIONS TO STRANGERS; DESTINATIONS TO HUSBAND AND WIFE; DESTINATIONS TO PARENT AND CHILD; *CONDITIO SI SINE LIBERIS.*

THIS chapter will be devoted to—

I. Terms descriptive of Heirs.
II. Institutes and Substitutes.
III. Destinations to Strangers.
IV. Destinations to Husband and Wife.
V. Destinations to Parent and Child.
VI. *Conditio si sine liberis.*

I. TERMS DESCRIPTIVE OF HEIRS.—The term "heir" may mean either the successor to the moveables or to the heritage of a deceased person. Thus, if a person dies possessed of moveables and heritage, and survived by a son and a daughter, and leaves a testamentary deed in favour of his heirs, his heritage will go to his son, and his moveables to his daughter.[1] An "heir-male" of a person is his nearest male heir, being a male connected by males.[2] Accordingly, a son, or a son of a son, or a brother, or a son of a brother, may be an heir-male; but a daughter or a son of a daughter, a sister or a son of a sister, cannot. An "heir-male of

Meaning of—(1.) "Heir."

(2.) "Heir-male."

(3.) "Heir-male of the body."

[1] See *Blair* v. *Blair*, 1849, 12 D., 97.

[2] Bell's Prin., sect. 1697; *Campbell* v. *Campbells and Brown*, 1770, M. 14,949; *Hay* v. *Hay*, 1788, M. 2315, aff. 1789, 3 Pat. App., 142.

the body" of a person means his eldest son or other nearest male heir, being a male connected by males, but, unlike an heir-male, an "heir-male of the body" cannot be a collateral; he must be in the direct line of descent.[1] Under destinations to "heirs-female of the body," the heirs called "are the descendants—whether females, or males connected by or partly through females—who would be heirs of line, or heirs-at-law, apart from special destination."[2] For example, if a testator leaves an estate to his heirs-female, his granddaughter by his eldest son is entitled to succeed in preference to his own daughter. An "heir-male" or an "heir-male of the body" can never be a female, but an "heir-female" may be a male or a female.

(4.) "Heir-female."

Effect of destination to—
(1.) Heirs and bairns.
(2.) Issue; or
(3.) Bairns; or
(4.) Children.
(5.) Nearest-in-kin.

If a father destines heritage to "his heirs and bairns," his heir in heritage alone succeeds to it;[3] but if he destines heritage to his issue,[4] or bairns,[5] or children,[6] the children take it in equal shares. A destination to "nearest in kin" gives the estate to the surviving next of kin, the issue of a predeceasing next of kin being excluded,[7] but not if that expression is followed by qualifying words indicative of heirs *ab intestato*.[8]

II. INSTITUTES AND SUBSTITUTES.—These terms require notice:—

(1.) Institute.
(2.) Proper Conditional Institute.
(3.) Constructive Conditional Institute.
(4.) Substitute.
(5.) Conditional Substitute.

[1] Bell's Prin., sect. 1700; and see *Lockhart* v. *Macdonald*, 1837, 15 S., 376, aff. 1842, 1 Bell's App., 202; *Forbes* v. *Clinton*, 1868, 6 Macph., 900, aff. 1873, 11 Macph. (H.L.), 44.

[2] Bell's Lect., vol. ii., 1078; *Dalrymple* v. *Hope*, 1739, 1 Pat. App., 237; M'Laren on Wills and Successions, vol. i., 595.

[3] *Fairservice* v. *Whyte*, 1789, M. 2317.

[4] See M'Laren on Wills and Successions, vol. i., 921 *et seq.*

[5] *Carnegie* v. *Clark and Alcorn*, 1677, M. 12,840.

[6] *Wilsons* v. *Wilson's Creditors*, 1811, Hume, 534; *Jardine* v. *Jardine*, 1850, 12 D., 504.

[7] *Young's Trustees* v. *Janes*, 1880, 8 R., 242.

[8] *Tronsons* v. *Tronsons*, 1884, 12 R., 155; and see *Hogg* v. *Bruce*, 1887, 14 R., 887; and *Gregory's Trustees* v. *Alison*, 1887, 14 R., 368, rev. 1889, 16 R. (H.L.), 10.

Meaning of—(1.) Institute;

(1.) An institute is the person first called under a destination in a deed to take an estate. Thus, A may dispone property (*a*) to himself, whom failing B, or (*b*) to his heirs-male, whom failing C, or (*c*) to B, whom failing X. In (*a*) A is institute; in (*b*) his heir-male is institute; and in (*c*) B is institute. (2.) A proper conditional institute is the person who is called under a destination to take an estate if a certain condition is purified. Thus, A may, on condition that he leaves no issue, dispone an estate to B. If A dies without being survived by issue, B is a proper conditional institute. If A dies survived by issue, his son, or, in the event of A's having no son, his daughters, take the estate in the same way as he or they would have done had the deed never been granted, and the destination as regards B is entirely evacuated. (3.) A constructive conditional institute is a person who, while not first called under a destination in a *mortis causa* deed to take an estate, yet first takes it because the institute has predeceased the testator. Thus, A may, by *mortis causa* undelivered deed, dispone heritage to B and the heirs-male of his body, whom failing to C. If B predeceases the testator, and leaves a son, the son is constructive conditional institute. If B predeceases the testator, and leaves no heir-male of his body behind him, then C is constructive conditional institute.[1] (4.) A substitute is a person who takes an estate under a destination after an institute or a constructive conditional institute has already taken. Thus, in case (3) above, if B had survived the testator, he would have taken as institute, and the heir-male of his body, or C, if there was no such heir-male, would take as a substitute on the death of B. There is this practical difference between an institute and a substitute, that the latter requires to make up a title as an heir,—that is, by service or writ of *clare constat;* whereas the former makes up a title as a disponee,—that is, by recording the disposition in his favour,

(2.) Proper conditional institute (or conditional institute of the first class);

(3.) Constructive conditional institute (or conditional institute of the second class);

(4.) Substitute.

Substitute must make up title as an heir.

[1] *Fogo* v. *Fogo*, 1842, 4 D., 1063, aff. 1843, 2 Bell's App., 195; *Hutchison*, 1872, 11 Macph., 229.

(5.) Conditional substitute.

or a notarial instrument thereon. (5.) An example of conditional substitution may be given. If A dispones by delivered deed to B, and, on condition that B has no issue, then to C, C is a conditional substitute. If B has issue, the destination in favour of C is evacuated. If B has no issue, C makes up a title as substitute to B, the institute. B's death without issue is a condition which must be purified before C can take under the destination.

Illustrative of what has been said on the subject of institution and substitution, a case may be stated and explained. Suppose that A, infeft, dispones by *mortis causa* undelivered deed an estate to B and the heirs of his body, whom failing, to C and the heirs of his body, whom failing, to D and the heirs of his body. This case suggests various questions, which, with their answers, may be given in this form:—

QUESTION.	ANSWER.
1. If B survives A, in what character and how does he complete a title?	1. B, institute, records the deed with a warrant of registration in his own favour in the appropriate Register of Sasines, *or* expedes and records, with a warrant, a notarial instrument.
2. If B survives A, but makes up no title, in what character and how will his son complete a title?	2. B having taken under deed by his survivance, his son is a substitute, and completes a title as heir of provision by general service to B. In virtue of the unfeudalised conveyance and decree of general service, a notarial instrument is expede and recorded.
3. If B survived and made up a feudal title, in what character and how would his son make up a title?	3. His son, a substitute, can make up a title to his father as heir of provision by recording (*a*) extract decree of special service; *or* (*b*) a precept or writ of *clare*

QUESTION.	ANSWER.
	constat ; or (*c*) a notarial instrument following on a decree of special or general service, or a precept or writ of *clare constat.*
4. If B survived A, but left no issue, and was survived by C, in what character and how would C make up a title if B had made up no title, or if he had made up a feudal title ?	4. C, a substitute, makes up a title as B's son did under 2 and 3.
5. If B survived A, made up a feudal title, and died after 1st October 1874, leaving son, who made up no title, in what character and how would C make up a title ?	5. C, a substitute, could make up a title, after serving as heir of provision to B, (*a*) by recording an extract decree of special service ; *or* (*b*) by recording a precept or writ of *clare constat* as heir of provision to B ; *or* (*c*) by recording notarial instrument following on a decree of special or general service, or a precept or writ of *clare constat.* (*d.*) C can also make up a title by petition under section 10 of the Conveyancing Act, 1874.
6. If B predeceases A, and leaves a son, in what character and how does the son complete a title ?	6. Son, a constructive conditional institute, completes a title by recording deed or notarial instrument, with a warrant in his favour. A general service by son to his father may be expede, merely to show that son is his heir ; the father had no right which the service could take up.
7. If B predeceases A, and leaves no issue, but C survives A,	7. C, a constructive conditional institute, completes a title

QUESTION.	ANSWER.
in what character and how does C complete a title?	by recording the deed, *or* a notarial instrument, with a warrant of registration in his favour.
8. If B, C, and D predecease A, and B and C leave no issue, but D leaves a son, in what character and how does he complete a title?	8. D's son, a constructive conditional institute, completes a title by recording deed, *or* a notarial instrument, with a warrant of registration in his favour. See 6.
9. Suppose that B predeceased A, but left a son who survived A, that B's son made up no title, that C, who survived B's son, made up no title, and that C's son, who survived C, made up no title, in what character and how, on C's son's death, does D make up a title?	9. B's son was constructive conditional institute, and therefore took the estate under deed granted by A. C and C's son were substitutes, and D is also a substitute. D, passing over C and C's son, can make up a title by expeding general service as heir of provision to B's son and recording notarial instrument. D can also make up a title, if C and C's son survived 1874, by petition under section 10 of the Conveyancing Act, 1874. For 1-9, see *Hutchison*, 11 Macph., 229; Hendry's Styles, 149 *et seq.*

Powers of institutes and substitutes.

Institutes and substitutes, who hold an estate not in virtue of a strict entail, can as a rule dispone the estate by deed, *inter vivos* or *mortis causa*, onerous or gratuitous.

III. DESTINATIONS TO STRANGERS.—If the intention of the granter of the deed, as gathered from the deed, has not assigned to them another meaning, the following destinations in deeds dealing with feudal subjects bear the meaning and effect placed opposite to them:—

DESTINATION.	MEANING.
1. To A and B jointly. 2. To A and B and their heirs. 3. To A and B jointly and their heirs. 4. To A and B in conjunct fee and their heirs. 5. To A and B conjunctly (or jointly) and their heirs and assignees.	1-5. A and B are fiars to the extent of one-half *pro indiviso* each. The share of each descends to his own heirs.[1]
6. To A and B in conjunct fee and liferent, and their heirs.	6. A and B are fiars to the extent of one-half *pro indiviso* each. The survivor has the liferent of the whole, which the predeceaser or his heirs cannot affect.[2]
7. To A and B jointly, and to the longer liver of them and their heirs. 8. To A and B and the survivor (or longer liver) of them.	7, 8. During their lives, A and B are fiars to the extent of one-half *pro indiviso* each, and each may dispone or burden by *inter vivos* or *mortis causa* deed his share, which is also attachable by creditors. The expression "their heirs" in 7 is held to mean the heirs of the survivor.[3] The survivor has the entire fee, exclusive of the heir of the predeceaser, the share of the predeceaser being subject to his debts and deeds. If infeftment has taken place in favour of A and B and the survivor, the survivor requires to make up no further title.[4] The warrant of registration on a deed containing such a

[1] Ersk. 3, 8, 35.
[2] *Ibid.*
[3] *Ibid.*, 3, 8, 36.
[4] See *Bisset* v. *Walker*, November 26, 1799, F.C.

DESTINATION.	MEANING.
	destination usually orders the deed to be registered on behalf of A and B for their respective rights and interests, although it is quite competent to order recording in full terms of the destination.[1]
9. To A and B jointly, and to B if he shall survive, and his heirs.	9. During their joint lives, A and B are fiars to the extent of one-half *pro indiviso* each, which can be disponed or burdened, or attached by creditors. If B survives A, he takes the entire fee, exclusive of the heir of the predeceaser, the share of the predeceaser being subject to his debts and deeds. If B predeceases A, the fee goes equally to A and the heir of B.
10. To A and B in conjunct fee and liferent, and to the said B if he shall survive, and his heirs.	10. If A survives B, A has the liferent of the whole, and is fiar to the extent of one-half *pro indiviso*, the fee of the remainder falling to B's heir. But if B survives A, he is fiar of the whole, exclusive of A's heir. See 6 and 9.
11. To A and B equally in liferent, and to the said B and his heirs in fee.	11. B is fiar. A has a liferent only of one-half *pro indiviso*.
12. To A and B, and the longer liver in liferent, for their liferent use allenarly, and to the heirs of A in fee.	12. During their joint lives, A and B have a liferent of one-half *pro indiviso* each. The survivor has a liferent of the whole. A's heir is the fiar.

[1] See Hendry's Styles, 74 ; Jur. Styles, vol. i., 56.

DESTINATION.	MEANING.
13. To A and B in conjunct liferent, for their liferent use allenarly, and to the heirs of the longer liver in fee.	13. During their joint lives, A and B have a liferent of one-half *pro indiviso* each. The survivor has a liferent of the whole, with a fiduciary fee for his heir, who is fiar. For 9-13, see Bell's Lectures, 843; Jur. Styles, vol. i., 112.
14. To A in liferent, and B in fee.	14. B's fee is burdened with a liferent in favour of A.
15. To A and B in liferent (or equally in liferent), and C in fee.	15. A and B have each a liferent of one-half *pro indiviso*, and on the death of one his interest does not accrue to the survivor. C is fiar.
16. To A, B, and C in liferent, (*or* equally in liferent), and D in fee.	16. A, B, and C have each a liferent of one-third *pro indiviso*, and on the death of one his interest does not accrue to the survivor. D is fiar.
17. To A and B and the survivor in liferent, and C and D in fee, *or* equally in fee, *or* conjunctly in fee, *or* jointly in fee, *or* in conjunct fee. 18. To A and B conjunctly (or jointly) in liferent, and C and D in conjunct fee.	17, 18. During their joint lives, A and B have a liferent to the extent of one-half *pro indiviso* each, and on the death of one, the survivor has the liferent of the whole. C and D are fiars to the extent of one-half *pro indiviso* each, and on the death of one his share goes to his heir, not to the survivor,—M'Laren on Wills, vol. ii., 30.

IV. DESTINATIONS TO HUSBAND AND WIFE.—(1) In conjunct destinations to spouses the fee *in dubio* is in the husband *propter eminentiam masculini sexus;*[1] but (2) if the

[1] Fraser on Husband and Wife, 1428, and authorities there cited.

estate comes from or through the wife,[1] or (3) if the property comes from a third party, and the wife's heirs are most favoured in the destination,[2] *i.e.*, are called immediately after the issue of the marriage, the fee is in her. However (4), if in either of these cases (2) (3) the estate is, expressly or impliedly, meant as tocher to the husband, the fee will be in him.[3] (5) The spouse who has a power of disposal of the fee is *in dubio* fiar.[4]

Subject to these explanations, the following destinations may be given:—

DESTINATION.	MEANING.
1. To A and B (spouses) in conjunct fee.	1-5. A, the husband, is fiar, and during the marriage he alone is liferenter; *Thom*, 1852, 14 D., 861. B, the wife, has only an eventual right of liferent in case of her survivance. The heirs called in 3, 4, and 5 have only a *spes successionis*, liable to be defeated. If such a destination as 3 occurs in an antenuptial contract of marriage, the *spes* of the heirs of the marriage may be defeated onerously, not gratuitously.[5]
2. To A and B (spouses) in conjunct fee and liferent.	
3. To A and B (spouses) and the heirs of their marriage.	
4. To A and B (spouses) and the heirs of their bodies.	
5. To A and B (spouses) and their heirs.	
6. To A and B (spouses) in conjunct fee and liferent, and the survivor of them, and the heirs of the marriage in fee.	6. A is fiar; his heirs are the heirs of the marriage.
7. To A and B (spouses) in conjunct fee and liferent (or in	7. The fee will be in the survivor, "their heirs," refer-

[1] *Robertson* v. *Mason*, 1795, M. 4491; *Anderson* v. *Laidlaw*, 1816, Hume, 218; *Paterson* v. *Foreman*, 1824, 2 S., 619.

[2] See Fraser on Husband and Wife, 1431.

[3] See Fraser on Husband and Wife, 1432.

[4] *Fernie* v. *Colquhoun's Trustees*, 1854, 17 D., 232; *Ferguson's Trustee* v. *Ferguson*, 1871, 10 Macph., 54.

[5] Bell's Lect., vol. ii., 834, and authorities there cited.

DESTINATION.	MEANING.
conjunct liferent), and the survivor of them, and their heirs in fee.	ring to the heir of the survivor.[1]
8. To A and B (spouses) and the longer liver of them in conjunct fee and liferent, for B's liferent use allenarly, and their son C in fee.	8. A is fiar. B's right is restricted to an eventual liferent, and C is a substitute only.[2]
9. To A and B (spouses) and the longer liver in conjunct fee and liferent, for A's liferent use allenarly, and their son C in fee.	9. B is fiar. A's right is restricted to an eventual liferent, and C is a substitute only.[3]
10. To A and B (spouses) in conjunct fee and liferent for their liferent only, and the children of the marriage in fee, whom failing, the heirs whatsoever of the parties equally,—the property having come from the wife.	10. If there are no heirs of the marriage, the fee is still in the wife, B.[4]

V. DESTINATIONS TO PARENT AND CHILD.—In conveyances to parent and child by third parties, or in marriage-contracts, or in conveyances which are to receive instant effect, the fee is presumed to be in the parent, owing to the feudal maxim that a fee cannot be *in pendente*. The rule does not apply to conveyances "by married persons to one another in liferent, and to their children to be born in fee, especially if proper *mortis causa* and testamentary conveyances. There, on principle as well as on the authority of practice, the term 'liferent' receives its natural and appropriate signification; leaving the fee (if there are no children who take it) in the person from whom the right flows."[5]

These destinations illustrate the rule and show cases to which it is not applicable:—

[1] Ersk. 3, 8, 36; *Fergusson* v. *M'George*, 1739, M. 4202.
[2] *Gordon* v. *Macculloch*, Feb. 23, 1791, F.C.
[3] *Gordon* v. *Macculloch*, Feb. 23, 1791, F.C.
[4] See Bell's Prin., 1956.
[5] Bell's Lect., vol. ii., 842.

DESTINATION.	MEANING.
1. To A in liferent, and the heirs of his body in fee.	1. A is fiar. His heir is a substitute.
2. To A in liferent, and his son, B, in fee.	2. A is liferenter. B is fiar. Here B is mentioned by name.
3. To A in liferent, and his son, C, in fee, but with power of disposal to A.	3. The nominal fee in C becomes absolute on A's death. If infeftment has taken place in favour of A and C, C requires to make up no title on A's death. If no infeftment has taken place, C, on A's death, will record the disposition, or expede and record a notarial instrument thereon.
4. To A in liferent, and his children *nati* or *nascituri* in fee.	4. A is fiar. His children are substitutes. See 1.
5. To A in liferent, and his child C, and other children to be born, in fee. Suppose that A is survived by C and two other children, D and E, how do D and E make up a title?	5. A is a liferenter. C has a fee for himself, a fiduciary fee for the children *nascituri*.[1] C can convey to D and E.
6. To A in liferent, and his children B and C, and any other children to be born, and the *survivors or survivor* of them.	6. A is liferenter, and fiduciary fiar for children in respect of clause of survivorship.[2] Until A's death, no vesting of fee in this case.
7. To A in liferent allenarly, or alimentary, or only, or merely, and the heirs of his body, or heirs-male, or heirs whomsoever, in fee.	7. A has a liferent for himself, and a fiduciary fee for his heir, the beneficial fee vesting in the heir *on A's death*,[3] If A dies (1) uninfeft, or

[1] See *Macgowan* v. *Robb*, 1864, 2 Macph., 943; *Dykes* v. *Boyd*, June 3, 1813, F.C.; *Martin's Trustees* v. *Milliken*, 1864, 3 Macph., 326.

[2] *Snell* v. *White*, 1872, 10 Macph., 745.

[3] *Ferguson* v. *Ferguson*, 1875, 2 R., 627; *Maule*, Petitioner, 1876, 3 R., 831; *Tod* v. *Mackenzie*, 1874, 1 R., 1203.

DESTINATION.	MEANING.
	(2) infeft to the extent of the liferent, or (3) infeft to the full terms of the destination, the heir can record the deed, or a notarial instrument, with a warrant in his favour.[1] See as to 5, 6, and 7, and doubts connected with the making up of title in such circumstances, Hendry's Styles, 152-157.
8. To A in liferent allenarly, or alimentary, or only, or merely, and his children in fee.	8. A has a liferent for himself, and a fiduciary fee for his children. Immediately on *birth* a beneficial fee vests in each of the children,[2] and they can complete a title as in 7. Here the children of A are, with regard to title, disponees, not merely heirs of the fiduciary fiar, A.
9. To my eldest son A and his lawful children in equal proportions.	9. A is sole fiar, and not merely a joint disponee along with his children, who are substitutes.[3]
10. To trustees *to hold* for A in liferent, and the children of A in fee.	10. A has a liferent. The fee goes to the children.[4]
11. To trustees *to pay over* to A in liferent, and to his children in fee.	11. A is fiar.[5]
12. To myself (viz., the disponer of the deed) and my children in fee.	12. The disponer having instituted himself, children are substitutes.[6]
13. To B in liferent, and children of C in fee.	13. B has only a liferent. C's children are fiars.[7]

[1] See *Maule, supra.*

[2] *Douglas* v. *Thomson*, 1870, 8 Macph., 374; *Otto* v. *Weir*, 1871, 9 Macph., 660; *Ramsay* v. *Beveridge*, 1854, 16 D., 764; *Napier* v. *Scott*, 1827, 2 W. and S., 550.

[3] *Edward and Others* v. *Sheill and Small*, 1848, 10 D., 685.

[4] See *Seton* v. *Seton's Creditors*, 1793, M. 4219; *Ross* v. *King*, 1847, 9 D., 1327; *Mackie* v *Gloag's Trustees*, 1884, 11 R. (H.L.), 10.

[5] *Beveridges*, 1878, 5 R., 1116; see Bell's Prin., sect. 1715.

[6] *Young's Trustees* v. *Young*, 1867, 5 Macph., 1101.

[7] *Ramsay* v. *Beveridge*, 1854, 16 D., 764.

VI. *Conditio si sine liberis.*—The condition *si testator sine liberis decesserit* is to be distinguished from the condition *si institutus sine liberis decesserit.*

1. *Conditio si testator sine liberis decesserit.*—If a person while childless makes a settlement, especially of his whole estate, and a legitimate child is born to him, either within a short period of his death or posthumously, the child can set aside the settlement, on account of the condition implied in it, that it is only to be effectual if the testator dies without leaving lawful issue.[1] The implied condition will be displaced by a manifest intention to disinherit. The *conditio si testator sine liberis decesserit* is sometimes expressed in a settlement.

2. *Conditio si institutus sine liberis decesserit.*—The effect of this implied condition in two cases has to be noted:—

(1.) Where the institutes called do not themselves take the estate conveyed to them because of their dying prior to the testator.

If a provision or a settlement of heritage or moveables is made by a person in favour of a child or children, grandchild or grandchildren, or descendants in the direct line, however remote, whether called *nominatim* or not, and the parties called predecease the testator, but have issue who survive him, such issue take the share bequeathed to their parent. Thus, if A dispones by testament an estate to his son B, and B predeceases him, but leaves a son C, C will take the estate in virtue of the implied condition *si sine liberis decesserit.* If B leaves daughters only, they as heir-portioners will take the estate, and they are conditional institutes. The condition *si institutus sine liberis decesserit* applies to a provision by one who, although not a parent, stands *in loco parentis* to his disponees. Thus the condition will be implied in a bequest to nephews and nieces, whether called as a

[1] *Colquhoun* v. *Campbell*, 1829, 7 S., 709; *Dobie's Trustee* v. *Pritchard*, 1887, 15 R., 2; M'Laren on Wills and Successions, vol. i., 257; Bell's Prin., sect. 1776.

class or *nominatim*, especially if they are all called to take by the deed.[1]

The condition does not apply to provisions in favour of (1) cousins;[2] or (2) brothers and sisters, at least called *nominatim*;[3] or (3) illegitimate children.[4] Cases in which *conditio* does not apply.

(2.) Where the institutes called, after taking, die leaving issue (who are not called as substitutes), and there is a substitution in the conveyance.

"Besides the legal effect of a conveyance by a parent to a child, as implying a conditional institution of that child's issue, there is, in direct substitutions after children of the testator, an implied condition that if a child should die leaving a lawful child, the substitution is not to take effect; but only if the institute should die childless." [5]

The condition *si institutus sine liberis decesserit*, like the condition *si testator sine liberis decesserit*, can be excluded by a manifest contrary intention of the testator.

[1] See *Blair's Executors* v. *Taylor*, 1876, 3 R., 362; *Bryce's Trustee* v. *Bryce*, 1878, 5 R., 722; *Grant* v. *Brooke*, 1882, 10 R., 92; *Tod* v. *Tod*, 1885, 12 R., 565; Bell's Principles, sect. 1776.

[2] *Rhind's Trustees* v. *Leith*, 1866, 5 Macph., 104.

[3] *Blair's Executors* v. *Taylor*, 1876, 3 R., 362.

[4] *Martin's Trustees* v. *Milliken*, 1864, 3 Macph., 326.

[5] Bell's Prin., sect. 1776, and authorities there cited.

CHAPTER II.

CONTRACTS OF MARRIAGE.

Leading object.

THE leading object of the contract of marriage is the settlement of provisions in favour of the spouses and the children to be born of the marriage, and the securing of such provisions against future acts of the spouses or the diligence of their creditors. By an antenuptial contract of marriage spouses can settle their rights and interests in the estates of each other, but they cannot agree to conditions inconsistent with the conjugal relations, against the public law, or in violation of morals.[1] Generally the contract of marriage either excludes or abridges all or any of these rights—the husband's (1) *jus mariti*, (2) *jus administrationis*, (3) *jus relicti*,[2] and (4) right of courtesy; the wife's (5) *jus relictæ*, and (6) right of terce; and the children's (7) right to *legitim;* and may, in lieu thereof, substitute provisions.

Antenuptial contract.

By an antenuptial contract, which is an onerous contract entered into in consideration of the marriage to be solemnised, the provisions in favour of the wife by the husband usually give her either a *jus crediti* or a preference as against his creditors; and, on the other hand, the provisions of the wife in favour of the husband usually give him either a *jus crediti* or a preference as against her creditors. The provisions to the children may in an antenuptial contract of marriage be such as to confer on them—

[1] Fraser's Husband and Wife, 1334. [2] 44 and 45 Vict., c. 21, sect. 6.

(1.) A *spes successionis in obligatione* merely, which, while it gives them no right to rank with creditors of either parent, cannot be defeated gratuitously; or,

(2.) A *jus crediti;* or

(3.) A preference, as against the creditors of their parents.

Married Women's Property (Scotland) Act, 1881.

Prior to the Married Women's Property (Scotland) Act, 1881,[1] the antenuptial contract of marriage was often used to protect the wife's estate against both the *jus mariti* and the *jus administrationis* of her husband and the diligence of his creditors, but the Act has materially affected the husband's rights in his wife's estate, and the antenuptial contract of marriage will not now be so necessary as it used to be to protect the wife's estate against the diligence of his creditors. Nothing in the Act, however, it is provided, excludes or abridges the power of settlement by antenuptial contract of marriage;[2] nor does the Act affect any contracts made, or to be made, between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the Married Women's Property (Scotland) Act, 1877,[3] which enacts that the wages and earnings made by married women after 1st January 1878 shall be free of the *jus mariti* and right of administration of their husbands, and that in marriages which take place after that date the liability of the husband for the antenuptial debts of his wife shall be limited to the value of any property received by him from, through, or in right of his wife before, at, or subsequent to the marriage.[4]

Act does not affect antenuptial contracts.

Married Women's Property (Scotland) Act, 1877.

Married Women's Property (Scotland) Act, 1881, as to—

The Married Women's Property (Scotland) Act, 1881, contains provisions applicable to marriages contracted both before and after its commencement. As regards marriages

[1] 44 and 45 Vict., c. 21.
[2] Sect. 1 (5).
[3] 40 and 41 Vict., c. 29, sect. 3, 4.
[4] 44 and 45 Vict., c. 21, sect. 8; see *M'Allan* v. *Alexander*, 1838, 15 R., 863.

(1.) Marriages after the Act;

contracted after the Act, if the husband had at the time of his marriage his domicile in Scotland, (1) the wife's moveable estate is vested in her as her separate estate, and is not subject to the *jus mariti;* (2) the income of such estate is payable to the wife on her individual receipt or order, and to this extent the husband's right of administration is excluded; (3) but she is not entitled "to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate;" (4) the wife's moveable estate is not subject to diligence for the husband's debts, provided that the estate (except such corporeal moveables as are usually possessed without a written or documentary title) is secured in the name of the wife herself, or in such terms as clearly distinguish the same from the estate of the husband; but (5) any estate of the wife lent or entrusted to the husband, or immixed with his funds, is treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such estate, after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied; and (6) the rents and produce of heritable estate in Scotland belonging to the wife are no longer subject to the *jus mariti* and right of administration of the husband.[1]

(2.) Marriages before the Act.

As regards marriages contracted before the Act, (1) the provisions of the Act do not apply where the husband has, before 18th July 1881, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him; and (2) in other cases the provisions of the Act do not apply except that the *jus mariti* and right of administration are excluded, to the extent prescribed in sections 1 and 2 with regard to marriages contracted subsequent to the Act, from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the

[1] 44 and 45 Vict., c. 21, sects. 1, 2.

Act; but parties married before the Act may by mutual deed come under the provisions of the Act as to estate (including such as may have previously come to the husband in right of the wife) acquired prior thereto.[1] Such mutual deed has to be registered in the Register of Deeds at Edinburgh, or in the Sheriff Court register of the county or counties in which the parties reside, and advertised in the *Edinburgh Gazette*, and three times in two local newspapers circulating in such county or counties in which the parties reside; but it is of no effect as against any debt or obligation contracted by the husband prior to the date of the deed being so advertised and registered.[2] Where a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate.[3]

Jus relicti from wife's estate introduced.

The Act also provides that the husband of any woman who dies domiciled in Scotland is entitled by operation of law to the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate,[4] and that the children of any woman so domiciled at the time of her death take the same right of *legitim* in regard to her moveable estate which they have in regard to the moveable estate of their deceased father.[5] The case of *Poe* v. *Paterson*[6] settles that a husband is entitled to *jus relicti* out of his wife's moveable estate, irrespective of the date of its acquisition and of the date of the marriage.

Legitim from mother's estate.

Married Women's Policies of Assurance (Scotland) Act, 1880.

In addition to the provisions of the two Acts above referred to, the enactments of the Married Women's Policies of Assurance (Scotland) Act, 1880,[7] are worthy of notice. By this Act a married woman may effect a policy of assurance on her own life or on the life of her husband for her separate use; and the same, and all benefit thereof, if expressed to be

[1] Sects. 3, 4.
[2] Sect. 4.
[3] Sect. 5.
[4] Sect. 6.
[5] Sect. 7.
[6] 1882, 10 R., 356; aff. 1883, 10 R. (H.L.), 73.
[7] 43 and 44 Vict., c. 26.

for her separate use, shall, immediately on being so effected, vest in her, and shall be payable to her heirs, executors, and assignees, excluding the *jus mariti* and right of administration of her husband, and shall be assignable by her, either *inter vivos* or *mortis causa*, without consent of her husband, and the contract in such policy shall be as valid and effectual as if made with an unmarried woman.[1] A policy of assurance, the Act further provides, effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency; and the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office; provided always, that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.[2] Under this enactment there must be actual or constructive delivery of the policy to confer a right on the beneficiaries.[3]

[1] Sect 1.
[2] Sect. 2.
[3] *Jarvie's Trustee* v. *Jarvie's Trustees*, 1887, 14 R., 411.

Where no trust is created a contract of marriage may consist of the following parts:— Parts of marriage-contract.

I. The narrative clause.
II. Disposition of husband's estate.
III. Provisions to the wife and younger children.
IV. Acceptance by wife of provisions in lieu of terce and *jus relictæ*, and declaration that children are to have no claim to *legitim*.
V. Disposition of wife's estate.
VI. Appointment of trustees to see obligations in marriage-contract implemented.
VII. Registration clause.
VIII. Testing clause.[1]

I. Narrative Clause.—This clause contains the names and designations of the parties to the contract, and a promise by the intending spouses to solemnise the marriage in usual form.

II. Disposition of Husband's Estate.—The destination in this part of the deed will be that agreed on, and the lands disponed can be described (*a*) by general description; or (*b*) by particular description; or (*c*) by description by statutory reference; or (*d*) by description by general name, in terms of section 13 of the Consolidation Act, 1868; or (*e*) by description in general terms; or (*f*) by description by reference not in statutory form.[2] The destination, for example, may be in favour of the husband himself and the heirs-male of the intended marriage, whom failing, to the heirs-male of his body by any subsequent marriage. Under such a destination the husband is fiar, but the heirs-male of the intended marriage have a *spes successionis in obligatione*, which the father may defeat for onerous[3] but not gratuitous consideration.[4] The When *spes successionis in obligatione* in heir of marriage.

[1] See Jur. Styles, vol. i., 174 *et seq.*
[2] See p. 41.
[3] *Cunynghame* v. *Cunynghame*, Jan. 17, 1804, F.C.
[4] *Graham* v. *Coltrain*, 1743, M. 13,010; *Ewen* v. *Ewen's Trustees*, 1824, 2 S., 612.

heirs-male of the marriage having only a *spes successionis in obligatione*, an assignation of it by him will convey nothing if he predecease his father.[1] If the father sells the estate he is not bound to re-invest the price;[2] but the heir-male of the marriage on his father's death, in a question with heirs, is a creditor for the price actually obtained for it.[3] The heirs-male of his body by any subsequent marriage will succeed to the estate on the failure of the heirs-male of the first marriage, and so long as the destination remains unaltered; but the father can defeat their *spes successionis in destinatione* gratuitously as well as onerously.[4] Again, the destination may be to himself and the heirs-male of the intended marriage, whom failing, to the heirs-male of any second marriage, whom failing, the heirs-female of the first marriage. Here also the husband is fiar, and, whilst he can defeat the *spes successionis in destinatione* of the heir-male of the second marriage for considerations onerous or gratuitous, he can only defeat the *spes successionis in obligatione* of the heir-male or heir-female of the first marriage for onerous considerations. The reason of this is, that the marriage-contract is deemed an onerous deed *quoad* the heirs of the marriage called in the destination, but gratuitous *quoad* other substitutes.[5]

Rights of the heir of the marriage in virtue of *spes*.

The heir of the marriage or the heir-male of the marriage cannot be known until its dissolution. But the eldest son being the presumptive heir, although he may have only a *spes successionis in obligatione*, as in the above cases, has (unless it is taken from him by the terms of the marriage-contract[6]) power during the subsistence of the marriage—

(1.) To discharge, for himself and his successors, any *spes successionis* he may have under it;[7] or,

[1] *Browning* v. *Hamilton*, 1837, 15 S., 999.
[2] *Cunynghame* v. *Cunynghame*, *supra*.
[3] *Earl of Wemyss* v. *Earl of Haddington*, Feb. 28, 1815, F.C.; aff. 1819, 6 Pat. App., 390.
[4] *Reid* v. *Reid*, 1827, 6 S., 198; *Craigie* v. *Gordon*, 1837, 15 S., 1157.
[5] See Fraser's Husband and Wife, 1401; Menzies, 576 *et seq.*
[6] See *Haig* v. *Haigs*, 1857, 19 D., 449.
[7] *Routledge* v. *Carruthers*, May 19, 1812, F.C.; *Majendie* v. *Carruthers*, Dec. 16, 1819, F.C., aff. 1820, 2 Bligh's App., 692.

(2.) To accept a propulsion of the fee, with or without conditions attached ;[1] or,

(3.) To consent to a conveyance of the estate to a stranger for gratuitous consideration.[2]

Such discharge, acceptance, or consent of the heir-presumptive, even although he predecease the dissolution of the marriage, and thus never was truly heir of the marriage, makes the father as free as if the marriage-contract had never existed.[3] When the heir of the marriage succeeds either by conveyance from his father, or after his father's death, he is absolute fiar, and can alter the order of succession. Even where the destination was to the heirs-male of the first marriage, whom failing, to the heirs-male of the second marriage, whom failing, to the heirs-female of the first marriage, and where the heir-male of the second marriage, in the absence of an heir-male of the first marriage, first succeeded, the heir-male so succeeding was held to have the right to alter the order of succession so as to defeat the *spes successionis* under the destination of the heir-female of the first marriage.[4]

When the heir of the marriage has a *jus crediti*.

The heir of the marriage may have more than a *spes successionis* in the estate disponed; he may have a *jus crediti*, entitling him to compete with his father's ordinary creditors, a right which a *spes successionis* does not give. Thus, an obligation by a parent in his contract of marriage to infeft the heir in lands *de presenti*, or against a determinate day, or a determinate age, or a clause restricting his own right to a liferent allenarly, will give the latter a *jus crediti*.[5]

Where heir of marriage has a fee, or preference.

The father's right will be restricted to a liferent—

(1.) If he dispones to himself in liferent allenarly, or only,

[1] *Fotherinyham* v. *Ogilvie*, 1797, M. 12,991 ; *Trail* v. *Trail*, 1737, M. 12,985 ; *Bonar* v. *Arnot*, 1683, M. 12,976.

[2] Bell's Prin., sect. 1972.

[3] See Fraser's Husband and Wife, 1419.

[4] *Edgar* v. *Johnston*, 1736, M. 4325.

[5] Ersk. 3, 8, 40 ; Fraser's Husband and Wife, 1421.

or alimentary, or merely, and to the heirs of the marriage in fee; or,

(2.) If he conveys to trustees to hold for himself in liferent and the heirs of the marriage in fee. Infeftment in full terms of the destination in (1) will divest the father of the proprietary fee; and infeftment in favour of the trustees in (2) will give them the fee.

(3.) Besides, if a *jus crediti* is secured by proper and preferable diligence, the heir of the marriage will have a preference in a question with creditors.

When sasine necessary to limit the parents' right to a fiduciary fee.

Cases of *Falconer*, and *Houlditch* v. *Newlands*.

In this connection the cases of *Falconer* v. *Wright*[1] and *Newlands* v. *Newlands' Creditors*[2] are of importance. In the case of *Falconer* there was a destination by a parent, infeft in lands, to himself in liferent allenarly, and to the bairns of the marriage in fee, and infeftment was taken to the extent of the liferent alone. On the parent's sequestration the claim of the heir of the marriage, an only child, to the fee of the estate was disallowed. Having a *jus crediti*, however, he was entitled to rank with his father's creditors.[3] Had infeftment been taken in full terms of the destination, the father would have been divested of the proprietary fee, and his creditors would only have been able to attach the liferent. In the case of *Newlands* there was a conveyance by a third person in a marriage-contract to one of the spouses in liferent allenarly, and the heirs of marriage in fee. Infeftment was taken to the extent of the liferent alone, and, on the spouse's sequestration, his creditors laid claim to the fee of the property, which claim was not sustained. The distinction between the case of *Falconer* and the case of *Newlands* is, that in the former the fee had been in the father prior to the granting of the marriage-contract, the limited infeftment on which did not divest him of the fee, whereas in the latter the fee was never in the father.[4]

[1] 1824, 2 S., 633; and see *Houlditch* v *Spalding*, 1847, 9 D., 1204.

[2] 1794, M. 4289.

[3] *Dundas* v. *Lord Dundas*, 1823, 2 S., 145; *Falconer* v. *Moncrieff*, 1825, 3 S., 455.

[4] See Fraser's Husband and Wife, 1450.

In the disposition of the husband's estate power may be reserved by him, *e.g.*, to alter the destination, but not so as to prejudice the right of succession of the issue of the marriage, or to entail the estate in whole or in part. Power reserved.

After the dispositive clause and the reservations, if any, follow the clause (*a*) of entry, which is declared to be at the date of the intended marriage; (*b*) of assignation to rents; (*c*) of assignation of writs; and (*d*) of warrandice.

III. Provisions to Wife and Younger Children.—The provisions by the husband to the wife, whether they are payable before or after his death, confer on her, as a rule, a *jus crediti* entitling her to rank with her husband's creditors, in respect of the provisions due to her, either absolutely or contingently, as the case may be;[1] but when the obligations in favour of the wife are of the nature of a succession she has no *jus crediti*.[2] If the provisions in favour of the children are payable after the father's death, they have no *jus crediti*, —only a *spes successionis in obligatione;* but a *jus crediti* will be conferred on them if the obligation in their favour be (1) one capable of being enforced against the father during his lifetime for principal or interest; or (2) of such a nature as to place him under restraint; or (3) one which, if implemented, will divest him of the fee.[3] But to the rule that provisions payable to children after the death of a parent do not confer a *jus crediti* in their favour, there is the exception that when these provisions are the counterpart of an onerous bargain, they give the children a *jus crediti*, and not merely a *spes successionis*. For example, a father, in his daughter's marriage-contract, bound himself to pay to her a liferent, which became payable after his death. The daughter and her husband, on account of the liferent, renounced her *legitim*, and the Court held that the daughter had a *jus crediti* in a ques- When wife has a *jus crediti*. Children usually have *spes* only. How *jus crediti* conferred on children.

[1] M'Laren on Wills and Successions, sect. 809.

[2] *Grant* v. *Robertson*, 1872, 10 Macph., 804.

[3] See Fraser on Husband and Wife, 1356 *et seq.*; and see Lord Moncreiff in *Goddard*, 6 D., 1018.

When wife and children have a fee or preference.

tion with the creditors of her father.[1] As in the case of the heir of the marriage, a preference may be given to the wife or to the younger children—(1) by restricting, in the case of heritage, the father's right to a liferent only, and giving the fee to the wife or children; or (2) by a conveyance of heritable or moveable property in trust for her or them; or (3) by securing by proper and preferable diligence provisions in which she or they have a *jus crediti*.[2]

How provisions to wife made—

(1.) Annuity;

Provisions by a husband to a wife may be made in different ways. (1.) A very common provision to the wife is an obligation by the husband to pay her an annuity if she survives him. If the husband has heritable estate, he often provides and dispones to her an annuity or jointure out of lands described, as well as binds himself personally in payment.

(2.) Conjunct destination;

(2.) A less common way of making provision to a wife is to convey an estate to the husband and wife in conjunct fee and liferent, or in conjunct fee and liferent for her liferent use allenarly, which will give her a liferent of the estate in the event of her survivance.

(3.) Locality;

(3.) A provision by way of locality in her favour is now seldom given. In this case the husband dispones certain lands to his wife to be enjoyed in liferent by her if she survives him. Infeftment following on the disposition of the annuity, or the conveyance to husband and wife in conjunct fee and liferent, or the conveyance of locality, will give the wife a preference *quoad* creditors of the husband.

(4.) When estate entailed.

(4.) A husband may possess an estate under an entail. (*a*) If the right of terce is not excluded by the entail, he can in his marriage-contract grant a provision out of the estate to the extent of the terce. (*b*) If the entail authorises provision to be made to the wife, the provision must be made in accordance with the terms of the entail. (*c*) The Aberdeen Act,[3] applicable to all entails unless where its operation is excluded by the deed of entail, allows heirs of entail in possession, including

[1] *Gordon* v. *Murray*, 1833, 11 S. 368.
[2] See p. 189.
[3] 5 Geo. IV., c. 87.

institutes, to make provisions in favour of their spouses or younger children. The heirs of entail are entitled under the Act to provide an annuity out of the estate to their spouses. The amount of an annuity granted by a male heir cannot exceed one-third part of the yearly rent or value of the estate, as at the death of the granter, after the deduction of burdens. The amount of an annuity granted by a female heir cannot exceed the one-half of such rent or value. If the estate is already burdened under the Act with an annuity to a spouse, a female heir cannot grant an annuity exceeding one-third of such value.

How provisions to children made.

With regard to the children of the marriage, it is common for the husband to bind himself in his marriage-contract to make payment at the first term of Whitsunday or Martinmas after his death of a sum to the child or children to be born of the marriage, other than the child who is then entitled to succeed to his lands. The children under such a provision have, as already stated, only a *spes successionis in obligatione*. He often reserves a power to apportion provisions among the children as he chooses, which power, however, he has at common law. Any object of such power may be altogether excluded.[1]

Sum payable after death.

Provisions to children out of entailed estate.

The Aberdeen Act allows an heir of entail in possession to make provisions in favour of children, binding himself or herself and the succeeding heirs of entail in payment thereof, with interest from the time at which the right of the next succeeding heir of entail begins. But these provisions must not exceed—for one child, one year's free rent or value; for two children, two years' free rent or value; and for three or more children, three years' free rent or value. By the Entail Amendment Act, 1875,[2] and the Entail Amendment Act, 1878,[3] if a provision has been made to a child who predeceases the granter, the issue of such

[1] 37 and 38 Vict., c. 37, sect. 1; *Mackie* v. *Mackie's Trustees*, 1885, 12 R., 1230.

[2] 38 and 39 Vict., c. 61, sect. 10.

[3] 41 and 42 Vict., c. 28, sect. 3.

child is entitled to the provision, and the heir in possession may grant provisions to the issue of a predeceasing child to the same extent as if the provision had been to a child.

Although a father has, by antenuptial contract of marriage, settled on the children of his first marriage his whole estate as at the date of his death, he may on entering on a second marriage make a reasonable provision for the children of the second marriage regard being had, in a question of what is reasonable, to the amount of his estate and to any other provisions the children of both marriages may have;[1] and under a settlement of an estate on the heirs of the marriage, who have no real right of fee, provision in favour of the wife as well as the children of a second marriage may be made.[2]

IV. Declaration that the Provisions to the Wife and Children shall be in full of their Legal Claims.—This clause may prevent disputes. Unless a contrary intention appears, a provision by a husband to a wife, whether in a marriage-contract or other deed, excludes her from claiming terce, 1681, c. 10; but the wife's *jus relictæ* is not readily discharged by implication.[3] Nor is a claim of *legitim* readily discharged by implication; the intention to exclude it must be clear.[4] Lord Fraser in the case of *Countess Dowager of Kintore*[5] expressed an opinion that an antenuptial contract of marriage cannot effectually exclude the right to *legitim* of a child of the marriage when it contains no provision for him in lieu thereof.

V. Conveyance by the Wife of her means and estate to the Husband and Children *nascituri*.—Little need be

[1] *Haldane* v. *Hutchison*, 1885, 13 R., 179.

[2] See Fraser's Husband and Wife, 1416, and authorities there cited; Bell's Prin., 1981.

[3] Ersk. 3, 9, 16; Fraser's Husband and Wife, 1060.

[4] *Countess Dowager of Kintore* v. *Earl of Kintore*, 1884, 11 R., 1013; aff. 1886, 13 R. (H.L.), 93.

[5] *Ibid.*; see also *Maitland* v. *Maitland*, 1843, 6 D., 244; *Baron Panmure* v. *Crokat*, 1856, 18 D., 703.

said on this clause, but as a husband is now entitled, in the absence of other satisfaction, to *jus relicti*[1] as well as courtesy out of his wife's property, and the children to *legitim* out of their mother's estate as well as their father's, a clause declaring the provisions by her to him and them to be in full of all legal claims of courtesy, *jus relicti*, and *legitim*, should be inserted in the marriage-contract. *Mutatis mutandis*, what has been said of provisions by a husband to a wife and children applies to provisions by a wife to a husband and children.

VI. Appointment of Trustees to secure implement of Provisions to Wife and Children.—While this clause is useful, the Court will, where there is no such clause, appoint a *curator ad litem* to a wife, or a *tutor* or *curator ad litem* to a child, who requires to sue for implement of the obligations in the marriage-contract.

VII. Registration Clause.—This clause provides for registration for preservation and execution.

VIII. Testing Clause.—This clause is in the ordinary form.

Completion of title under marriage-contracts—(*a*.) When granter infeft;

Completion of Title under Marriage-Contract.—When the granter is infeft in the lands conveyed in a marriage-contract, a feudal title to them under the marriage-contract can be made up in favour of the grantees in different ways. If the lands are described by (*a*) general description; or (*b*) particular description; or (*c*) description by statutory reference; or (*d*) description by general name in terms of section 13 of the Titles to Land Consolidation Act, 1868—(1) the contract of marriage may be recorded with a warrant of registration in the appropriate Register of Sasines; or (2) a notarial instrument may be expede, and with warrant recorded.[2] If the contract of marriage contains a clause of direction, the warrant of registration may or may not refer to it. If it does,

[1] See *Fotheringham's Trustees* v. *Fotheringham*, 1889, 16 R., 873.

[2] 31 and 32 Vict., c. 101, sects. 15, 17, and see p. 115.

then the parts of the contract directed to be recorded, and the clause of direction, the testing clause, and the warrant of registration will alone appear on the register.[1] If a notarial instrument is expede on a contract containing a clause of direction, then the notarial instrument must narrate the parts directed to be recorded. (3) If the lands conveyed are only described (*a*) in general terms, or (*b*) by reference not in statutory form, it is necessary, in completing a title, to expede and record with warrant a notarial instrument.[2]

(*b.*) When granter not infeft.

If the granter is not infeft, the marriage-contract is treated as an assignation, and a title can be made up by the grantees by recording a notarial instrument.[3]

Postnuptial contracts.

Postnuptial Contracts.—If the provisions of a postnuptial contract of marriage are to give the wife a *jus crediti* against her husband's creditors, these circumstances must all concur:—

(1.) The husband must be solvent when it is made.[4]

(2.) The provisions in the wife's favour must be reasonable in amount with regard to the husband's estate.[5]

(3.) The provisions must not be payable during the subsistence of the marriage.[6]

Provisions in favour of children under a postnuptial contract confer on them no *jus crediti* entitling them to rank with creditors, unless there has been actual or constructive delivery of the deed, and unless it was granted during the solvency of the parent. If the deed remains undelivered, the contracting spouses can revoke it so far as it confers provisions on children. *Legitim* cannot be defeated by provisions in a postnuptial contract.[7]

[1] 31 and 32 Vict., c. 101, sect. 12.
[2] *Ibid.*, sect. 12.
[3] *Ibid.*, sect. 23.
[4] Bell's Prin., sect. 1942; Fraser's Husband and Wife, 1498.
[5] *Sharp* v. *Christie*, 1839, 1 D., 396; *Mitchell* v. *Mitchell's Trustees*, 1877, 4 R., 800.
[6] *Dunlop* v. *Johnston*, 1867, 5 Macph. (H.L.), 22.
[7] See Fraser's Husband and Wife, 1498.

CHAPTER III.

TESTAMENTARY DEEDS.

Contents of trust-disposition and settlement.

A TESTATOR may leave his estate directly to beneficiaries; but there are circumstances in which it is better to dispone his estate to trustees, in order that they may hold or distribute it as he directs. In these circumstances the testator may resort to the use of a trust-disposition and settlement, The contents of the trust-disposition and settlement, shortly stated, are—

I. The Narrative Clause.
II. Disposition of Estate.
III. Purposes of Trust.
IV. Powers of Trustees.
V. Revocation of prior Settlements, and power to revoke or alter.
VI. Consent to Registration.
VII. Testing Clause.[1]

How far minors can test.

I. NARRATIVE CLAUSE.—It will be kept in view that a minor, while he can bequeath his moveables without consent of his guardians, cannot, even with such consent, bequeath subjects heritable *sua natura* as opposed to heritable *destinatione*,[2] and that no testamentary bequest of estate can take away or abridge a right of terce or of courtesy, *jus relictæ*, *jus relicti*, or *legitim*.

How far married persons can test.

Conveyance general or special.

II. DISPOSITION OF ESTATE.—This part generally bears that the testator gives, grants, assigns, and dispones to trustees

[1] Jur. Styles, vol. i., 287.

[2] *Brand's Trustees* v. *Brand's Trustees* 1874, 2 R., 258.

named his whole property, heritable and moveable; and the general conveyance may or may not be followed by a special conveyance of certain subjects. In *mortis causa* conveyances of heritage executed by persons dying prior to the commencement of the Titles to Land Consolidation Act, 1868,[1] the word "dispone" was an essential.[2] The Titles to Land Consolidation Act, 1868, however, enacts—(1) that no testamentary or *mortis causa* deed purporting to convey or bequeath lands which has been granted by any person alive at the commencement of the Act, or which shall be granted by any person after the commencement of the Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the granter has not used with reference to such lands the word "dispone," or other word or words importing a conveyance *de presenti;* and (2) that when such deed or writing contains with reference to lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, it shall be taken to be equivalent to a general disposition of such lands in favour of the grantee or legatee.

"Dispone" unnecessary now.

What words sufficient to carry heritage.

The intention of the testator, as gathered from the deed, is the rule for construing a testamentary writing, whether it deals with moveable or heritable property, or both; but if a *mortis causa* deed is intended to carry lands, it must contain words not confined to moveables alone, — it must contain words sufficient to carry heritage. Thus, a testamentary conveyance of a person's "effects" has been held not to include heritage;[3] but in the case of *Forsyth* v. *Turnbull*[4] a testator, "in order to prevent all dispute after my death

Rule for construing a testamentary deed.

"Effects" does not carry heritage.

[1] 31 and 32 Vict., c. 101.

[2] *Kirkpatrick* v. *Kirkpatrick's Trustees*, 1873, 11 Macph., 551; aff. 1874, 1 R. (H.L.), 37.

[3] *Pitcairn* v. *Pitcairn*, 1870, 8 Macph., 604.

[4] 1887, 15 R., 172; and see *Campbell* v. *Campbell*, 1887, 15 R., 103; *Urquhart* v. *Dewar*, 1879, 6 R., 1026; *Aim's Trustee* v. *Aim*, *&c.*, 1880, 8 R., 294; *Ford's Trustees* v. *Ford*, 1884, 11 R., 1129; *Oag's Curator* v. *Corner*, 1885, 12 R., 1162; *Studd* v. *Studd*, *&c.*, 1880, 8 R., 249, aff. 1883, 10 R. (H.L.), 53.

regarding the disposal of my property," bequeathed to his wife "the whole of the means and effects" in his possession, or belonging to him at the time of his death, and it was held that his will carried his heritage, although acquired subsequent to the date of the will. The statute having put heritage in the same position as moveables when dealt with in a testamentary deed, direct words of conveyance of heritage are not essential. For example, a testator empowered his trustees to "realise all his heritable and moveable property," and directed them as to the disposal thereof. The testator's estate, heritable and moveable, was held to be conveyed to the trustees.[1]

Direct words of conveyance not necessary.

It is often difficult to determine whether a particular estate is carried by a general disposition of lands. (1.) The granter of such a deed may possess, as institute or substitute, lands destined to a special series of heirs by a conveyance of which he is not the author. In this case, the general disposition will include the specially-destined lands in the absence of evidence of a contrary intention.[2] (2.) A person may destine an estate to a special series of heirs, and then make a general disposition of his property in favour of a different series of heirs. As a rule, the latter deed will not override the terms of the former, there being a presumption that a general disposition does not include estate, the succession to which has been regulated by a prior deed of the testator. The presumption will give way to evidence of contrary intention.[3] (3.) If a person makes a general disposition, and afterwards buys subjects, the disposition of which contains a special destination inconsistent with the general disposition, these subjects will not fall under the general disposition.[4] Where the maker of a general disposition acquires after its date heritable property, the title to

Whether a particular estate is carried by a general disposition.

(1.) Lands specially not destined by testator.

(2.) Lands destined specially by testator.

(3.) Lands acquired after date of general disposition, and specially destined.

[1] *M'Leod's Trustees* v. *M'Leod*, 1875, 2 R., 481.

[2] *Campbell* v. *Campbell*, 1878, 6 R., 310; aff. 1880, 7 R. (H.L.), 100.

[3] See *Thoms* v. *Thoms*, 1868, 6 Macph., 704; *Glendonwyn* v. *Gordon*, 1870, 8 Macph., 1075, aff. 1873, 11 Macph. (H.L.), 33.

[4] *Webster's Trustees* v. *Webster*, 1876, 4 R., 101; *Farquharson* v. *Farquharson*, 1883, 10 R., 1253.

which is taken in favour of himself and his heirs and assignees whomsoever, the general disposition will carry such property.[1]

(4.) Disentailed estate.

(4.) An heir in possession of an entailed estate may expede and record an instrument of disentail. If he dies intestate, the estate will go to the next substitute, the registration of the instrument not altering the destination. If he leaves a general disposition, it is a question of intention whether the disentailed estate is carried by it.[2]

When some named trustees do not accept.

The disposition is generally to trustees and the survivors or acceptors, and survivor or acceptor of them. But where there is no destination to acceptors or survivors, the nomination does not fall by the death or non-acceptance of some of them, unless the intention of the testator is clearly to that effect. The non-acceptance of office by a trustee named as a *sine quo non* may or may not be essential; but if he accepts, his consent to deeds of the trust is essential.[3] On the failure of those nominated to act as trustees, the Court may, on the application of any party having an interest in the trust-estate, appoint new trustees in virtue of the Trusts (Scotland) Act, 1867.[4]

Non-acceptance of a trustee named as a *sine quo non*.

Failure of trustees.

III. Purposes of the Trust.—The purposes of the trust may be such as these:—(*a*) the payment of the truster's debts; (*b*) the payment of an annuity to his widow; (*c*) the payment of legacies to children or strangers; (*d*) the conveyance at a certain time of heritable property to one or all of the children (*e*) the disposal of the residue to children or to others.

Classes of legacies.

Legacies are of these classes:—(1) universal or residuary; (2) general; (3) special; (4) demonstrative; (5) the *legatum liberationis;* (6) the *legatum rei alienæ.* A universal or residuary legacy is a bequest of the whole free estate of the testator—*i.e.*, his estate, minus debts, expenses, and

(1.) Universal or residuary legacy.

[1] *Philip* v. *Philip*, 1885, 13 R., 329.
[2] *Gray* v. *Gray's Trustees*, 1878, 5 R., 820.
[3] See Bell's Lect., vol. ii., 945, 946.
[4] 30 and 31 Vict., c. 97, sect. 12.

other legacies. A general legacy, or *legatum quantitatis*, is a bequest of so much moveable estate,—not of a special debt or particular article. A special legacy, on the other hand, is the bequest of a special debt or a particular article. A demonstrative legacy is a bequest "of a sum of money payable out of or charged upon a particular subject or security, and is similar in its legal properties to a legacy of quantity."[1] The *legatum liberationis* is a bequest of a debt or debts due by the legatee to the testator; and it falls under the category of special legacies. The *legatum rei alienæ* is a bequest of a subject not belonging to the testator. If the testator knew that the subject of bequest was not his property, his executor must buy it for the legatee; but if the testator wrongly believed it to be his, the legacy is ineffectual. The right of a legatee of a special legacy is different from that of a legatee of a general legacy. The legatee of a special legacy has, on the testator's death, a right of action (to which the executor must be made a party) against the possessor of the subject of the bequest; the legatee of a general legacy has only a personal right of action against the executor. Special legacies are preferable to general legacies or residuary legacies, but if the subject of a special legacy perishes before delivery, or if it is converted by the testator during his lifetime to other purposes, it is held to be revoked. Thus in *Anderson* v. *Thomson*,[2] a lady bequeathed by her testament a deposit-receipt containing a sum, and after making her testament she uplifted the deposit-receipt and invested the money contained in it on heritable property. The Court held that the legacy was special, and that it had been adeemed in consequence of the contents of the deposit-receipt having been uplifted, and otherwise invested during the testator's lifetime.[3] A verbal legacy is valid to the extent of £8 : 6 : 8, but a verbal legacy to a greater amount can be proved by the oath of the

(2.) General legacy.

(3.) Special legacy.

(4.) Demonstrative legacy.

(5.) *Legatum liberationis.*

(6.) *Legatum rei alienæ.*

Rights of special legatee.

Ademption of special legacies.

Verbal legacy, how far good.

[1] M'Laren on Wills and Successions, vol. i., 388.

[2] 1877, 4 R., 1101.

[3] See M'Laren on Wills and Successions, vol. i., 387 *et seq.*; and Bell's Prin., sects. 1873-1878.

executor when he is residuary legatee.[1] If trustees are instructed to purchase an annuity for a widow or other person, the annuitant may require the trustees to make over the sum necessary to purchase it,[2] if the annuity is not declared to be alimentary.[3]

Donations *mortis causa.*

A donation *mortis causa* has to be distinguished from a legacy. A donation *mortis causa* was defined in *Morris* v. *Riddick*[4] "as a conveyance of an immoveable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and failing such revocation, then for the grantee on the death of the granter." Since the case of *Morris* was decided, it has been held that —(1) the donation does not require to be made under the apprehension of immediate death, it being sufficient that the donation is made in contemplation of death; and (2) that actual delivery of the subject of the donation by the donor to the donee is not necessary if the *animus donandi* is proved.[5] A donation *mortis causa* made entirely for administrative purposes, or partly for administrative purposes and partly for the donee's own behoof, is not valid to any extent.[6] Deposit-receipts, bills of exchange, promissory notes, and cheques do not operate as testamentary writings, nor do they *per se* constitute donations *inter vivos* or *mortis causa* in favour of the persons in whose names they are conceived failing the holder.[7] Thus, in *Jamieson*, a husband deposited money, taking therefor a deposit-receipt in favour of himself and his wife and the survivor, and it was held that the terms of the deposit-receipt did not constitute a donation either *inter vivos* or *mortis*

[1] See Dickson on Evidence, sect. 613.

[2] *Dow* v. *Kilgour's Trustees*, 1877, 4 R., 403.

[3] *White's Trustees* v. *Whyte*, 1877, 4 R., 786.

[4] 1867, 5 Macph., 1036.

[5] *Blyth* v. *Curle*, 1885, 12 R., 674.

[6] *Thomson* v. *Dunlop*, 1884, 11 R., 453; *Sharp* v. *Paton*, 1883, 10 R., 1000.

[7] *Cuthill* v. *Burns*, 1862, 24 D., 849; *Watt's Trustees* v. *Mackenzie*, 1869, 7 Macph., 930; *Miller* v. *Miller*, 1874, 1 R., 1107; *Milne* v. *Grant's Executors*, 1884, 11 R., 887; *Jamieson* v. *M'Leod*, 1880, 7 R., 1131.

causa to the wife. But a deposit-receipt taken in the donee's name is an important element in the evidence establishing donation; see Lord President (Inglis) in *Crosbie's Trustees* v. *Wright*,[1] and Lord Mure in *Jamieson* v. *M'Leod*.[2] Whilst this is the law as to deposit-receipts, bills of exchange, promissory notes, and cheques, the destination in bonds, railway debentures, stock certificates, and such-like documents is an operative destination, and the right to them passes to parties called by the destination on the death of the person who obtained them.[3] A donation *mortis causa* of moveable estate, though in value above £8 : 6 : 8, is effectual without writing—it can be proved by parole; but to the constitution of a donation *mortis causa* of heritable estate writing is essential. To prove a donation *mortis causa* of moveable estate in the general case, the evidence of the alleged donees, unless corroborated by facts and circumstances, or by other witnesses, is not sufficient.[4] In *Crosbie's Trustees* v. *Wright* a deposit-receipt was taken in the name of the depositor, his sister, and her husband, "to be paid to any, or survivor or survivors of them." After the depositor's death, the receipt was found in a room of the house of his sister, which he had been in the habit of using; and his sister and her husband deponed that the depositor had stated that he had lodged the money in bank for their behoof after his death. Holding that the terms of the deposit-receipt did not *per se* operate a donation in favour of the sister or her husband, and that the depositions *per se* of these two would not have been sufficient to instruct a donation of the deposit-receipt in their own favour, the Court yet decided that it was not necessary for them to prove delivery of the deposit-receipt, and that their evidence, as corroborated by the facts and circumstances of the case, was sufficient to instruct a donation *mortis causa* of the deposit-receipt. A

[1] 1880, 7 R., 823.
[2] 1880, 7 R., 1131.
[3] *Connell's Trustees* v. *Connell's Trustees*, 1886, 13 R., 1175.
[4] See *Sharp* v. *Paton*, and *Crosbie's Trustees* v. *Wright*, *supra*.

donation *mortis causa* resembles a legacy in these respects—(*a*) in being revocable; (*b*) in being liable for the donor's debts when there is a deficit of other funds for their payment; (*c*) in not affecting either *legitim, jus relictæ*, or *jus relicti;* and (*d*) in being subject to legacy duty: but a donation *mortis causa* differs from a legacy (*a*) in not requiring writing for its constitution if the subject of the gift is moveable, although exceeding £8 : 6 : 8 in value; and (*b*) in being preferable to legacies.[1]

Vesting of legacies.

It is often difficult to determine when the vesting of a legacy takes place, or, in other words, when the legatee has an indefeasible right to it, which he can transmit by *inter vivos* or *mortis causa* deed to others, or which transmits, in the event of his dying intestate, to his heirs. There is sometimes in a testamentary writing a clause declaring not only when legacies are payable but also when they vest. This clause, if clearly expressed, and not inconsistent with the purposes of the testament,[2] puts the period of vesting beyond dispute. For determining the period of vesting, in the absence of such a clause, these rules may be given:—(1.) The intention of the testator, as gathered from his testamentary writings, will determine the period of vesting. (2.) There is a presumption in favour of vesting *a morte testatoris*, especially if the period of payment or of distribution is not postponed, and that whether the legatees be individuals *nominatim* or a class.[3] (3.) The giving of a liferent to one person, and the fee to another, or to another and his heirs and successors, does not prevent the vesting of the fee *a morte testatoris*, whether the testator has created a trust or not.[4] In *Carleton* Lord Colonsay said:—"At one time doubts were entertained as to the case where

Clause declaring period of vesting.

Rules of vesting.

(1.) Intention of testator.

(2.) Presumption for vesting *a morte testatoris.*

(3.) Liferent to one, fee to another.

[1] See Lord Deas in *Morris* v. *Riddick*, 1867, 5 Macph, 1036; and *Lord Advocate* v. *Galloway*, 1884, 11 R., 541.

[2] See *Croom's Trustees* v. *Adams*, 1859, 22 D., 45.

[3] *Carleton* v. *Thomson*, 1865, 3 Macph., 514; aff. 1867, 5 Macph. (H.L.), 151.

[4] *Carleton* v. *Thomson, supra; Nimmo* v. *Murray's Trustees*, 1864, 2 Macph., 1144; *Marchbanks* v. *Brockie*, 1836, 14 S., 521; *Cochrane* v. *Cochrane's Executors*, 1854, 17 D., 103; *Douglas* v. *Douglas*, 1864, 2 Macph., 1008.

the settlement was by a trust-deed, to hold for a liferenter and successive persons as fiars, but the tendency of recent decisions in that class of cases, and indeed in almost all cases, has been in favour of the vesting of the fee *a morte testatoris*, unless the terms of the deed are such as to exclude that construction." (4.) If a condition personal to the grantee is attached to a legacy, vesting will not as a rule take place until the condition is purified. Thus, if a legacy is payable to a legatee on his attaining majority or his marriage, there is no vesting until the occurrence of one of these events.[1] (5.) But if a legacy is payable at a *dies certus*, or a *dies incertus*—for example, if a legacy is payable to A on the death of B (an event which must take place), or the marriage of B (an event which may never take place)—vesting will take place *a morte testatoris* in respect of the *dies certus*, the death of B in this case.[2] (6.) Unless a contrary intention is expressed or is implied, words of survivorship are referable to the period of distribution, and vesting is postponed till that time.[3] "Where a benefit," said Lord Young in the recent case of *Peacock's Trustees* v. *Peacock*,[4] "is given by will, and it is provided that in the event of the person benefited dying the benefit is to go to some one else, that will be held *prima facie* to mean in the event of his dying before the testator. When you have a clause of survivorship, however, there is authority for holding that the event of death is referable to the period of distribution, because before that period arrives you do not know who are to benefit, and it is now firmly enough settled that where payment is postponed until the death of a liferenter, and is then to be made according to the existing state of the family, there being a clause of survivorship, the event of predecease is to be regarded with reference

(4.) Condition personal to the grantee attached to legacy.

(5.) Legacy payable at a *dies certus* or *dies incertus*.

(6.) Words of survivorship.

[1] *Torrie* v. *Munsie*, 1832, 10 S., 597; *Fergusson* v. *Smith*, 1867, 6 Macph., 83. See also *Wood* v. *Burnet's Trustees*, 1813, Hume, 271; *Matthew* v. *Scott*, 1844, 6 D., 718.

[2] *Home* v. *Home*, 1807, Hume, 530; *Mackintosh* v. *Wood*, 1872, 10 Macph., 933.

[3] *Young* v. *Robertson*, 1862, 4 Macq., 314; *Melrose* v. *Melrose's Trustees*, 1869, 7 Macph., 1050; *Howat's Trustees* v. *Howat*, 1869, 8 Macph., 337.

[4] 1885, 12 R., 878.

(7.) Destination-over of fee.

to the period of distribution." (7.) Not infrequently a liferent of estate is given to one, and the fee is destined to another, whom failing, to a third party—that is, there is in the destination of the fee a conditional institution or destination-over. The destination-over may prevent the vesting of the fee *a morte testatoris*.[1] Thus, if the residue of an estate is destined to A in liferent and his issue in fee, and failing his leaving issue, then on the expiry of the liferent to B and his heirs, executors, and assignees, no right vests in B till the death of the liferenter without issue.[2]

(8.) Fee may vest, subject to defeasance.

(8.) A fee in moveable or heritable estate may vest subject to defeasance.[3] In the case of *Robertson*, a wife by antenuptial contract settled, in the event of her predeceasing her husband, property on him in liferent allenarly and the children of the marriage in fee. She reserved to herself a power to apportion the fee among the children, and, in the absence of such apportionment, the fee was to be divided equally among them, excepting the eldest child of the marriage in the event of his happening to succeed, exclusively of the other children, to any estate in right of his father, of equal or greater value than his equal share of his mother's estate. The mother exercised a power of apportionment instructing an equal division among the children who should survive the longer liver of the spouses, but excluding from the division the eldest or other son who should succeed to his father's estates. The eldest son predeceased his father, but was survived by two daughters. In giving judgment Lord Neaves said—"Though a fee may have vested, our law recognises vesting to take place subject to defeasance upon a supervening event; and in this deed there is a provision

[1] See *Bryson's Trustees* v. *Clark*, 1880, 8 R., 142; *Steel's Trustees* v. *Steel*, 1888, 16 R., 204; and comp. *Gregory's Trustees* v. *Alison*, 1887, 14 R., 368, rev. 1889, 16 R. (H.L.), 10.

[2] See Lord President in *Steel's Trustees*, *supra*, and *Bell* v. *Cheape*, 1845, 7 D., 614.

[3] *Robertson and Others*, 1869, 7 Macph., 1114; *Balderston* v. *Fulton*, 1857, 19 D., 293; *Grant* v. *Grant's Trustees*, 1859, 22 D., 53; *Stewart* v. *Nicolson*, 1859, 22 D., 72; *Bruce* v. *Preston's Trustee*, 1874, 1 R., 740; *Taylor* v. *Gilbert's Trustees*, 1878, 5 R. (H.L.), 217; *Fraser* v. *Fraser's Trustees*, 1883, 11 R., 196; *Bradford* v. *Young*, 1884, 11 R., 1135.

to the effect that if the eldest son shall succeed, exclusively of the other children, to an estate in right of his father, of equal or greater value than his equal share of his mother's estate, he shall not be entitled to the latter. If, then, the eldest son of the marriage had succeeded to an estate in right of his father, he clearly would have forfeited his right to share in his mother's estate. As it happened, however, the eldest son survived his mother, but died before succeeding to his father's estate, which went to the second son, to the exclusion of the eldest son's daughters, and the question is, whether the second son is excluded from sharing in his mother's estate. I am of opinion that he is. A deed of the nature of a marriage-contract which is one of *optima fides* is to be read with reference to the intention of the contracting parties, which, if plainly expressed, must receive effect. Now I cannot read this deed without seeing that it was the intention of the parties that whichever son succeeded to an estate of equal or greater value through his father should be excluded from sharing in his mother's estate. The result of this opinion is that the second son, though at his mother's death not the presumptive heir to his father's estate, has, by succeeding thereto, lost his interest in the fund with which we are here dealing, and, on the other hand, that the eldest son's executors have a claim to the share on the fund which vested in him by his survivance of his mother, subject no doubt to defeasance on the occurrence of an event which, however, did not take place." In *Haldane's Trustees* v. *Murphy*,[1] Lord President Inglis said—"A right of property vesting subject to defeasance is no anomaly. On the contrary, the law is quite familiar with such conditional vesting. The most frequent cases are probably those which occur in tailzied succession, when the heir who for the time is next entitled to succeed under the destination may be excluded by the birth afterwards of a nearer heir, who, for the time, is only *in spe*. . . . But this kind of defeasible fee is not confined to tailzied succession

[1] 1881, 9 R., 269.

or to heritable succession. It occurs also in the case of moveable succession provided by deed of settlement." "When a fund is settled on the daughters of the testator," said Lord President Inglis in the case of *Steel's Trustees* v. *Steel*, cited above, "for their liferent use allenarly, and their children, if any, in fee, whom failing, to another person or other persons in absolute property, with no further destination, the vesting of the fee in the last-named person or persons will depend on these considerations—whether the person so called to the succession, if only one, was a known and existing individual at the date of the death of the testator, or if more than one, whether the persons so called were all of them known and existing at that date; or if the destination is to a class called by description, whether the individuals who constitute the class are ascertained at that date, or whether he or they cannot be known or ascertained till the death of the liferenters or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event which will determine who are the persons called or the individuals composing the class are ascertained. But when the person or persons called are known, or the individuals composing the class are ascertained at the date of the death of the testator, then the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters, or any of them, leaving issue."

(9.) Non-exercise of discretionary power by trustees.

(9.) Discretionary powers may be conferred on trustees, so that their non-exercise may prevent the vesting of provisions in legatees.[1] For example, trustees were directed to invest a sum for the testator's nephew, and to give it to him in such sums and ways, and at such times, as they thought best. The nephew, who survived the testator, received nothing from the trust-estate, and it was held that no right had vested in him. When a testator directs his trustees to pay a sum to

[1] *Paterson's Trustee* v. *Paterson*, 1870, 8 Macph., 449; *Smith's Trustees* v. *Smith*, 1883, 10 R., 1144.

a first-named legatee as soon as they find it convenient after his death, and, in the event of such legatee dying before the period of payment, to pay it to a second-named legatee, vesting will take place in the first-named legatee *a morte testatoris*, even though he should die before the testator's estate is realised by the trustees.[1] Even when a testator directs his trustees to realise his estate and to pay legacies to legatees, and provides that if any of them die before receiving payment of their share it shall go to others, the law holds that what the testator ordered to be done shall be held to have been done within a reasonable time from the date of his death, in accordance with the maxim in trust law, *quod fieri debet infectum valet*, and vesting takes places after the lapse of such reasonable time.[2] (10.) Although the time of division of a testator's estate may not have arrived, the Court may in certain cases authorise the trustees to accelerate the period of division, if the beneficiaries have a vested right in the estate. "I see no reason," said Lord Watson in the recent case of *Muirhead* v. *Muirhead*,[3] "to doubt that in cases where the first distribution of a trust-estate is directed to be made on the death of an annuitant, and it clearly appears that in postponing the time of division the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, upon the discharge or renunciation of the annuitant's right, to ordain an immediate division. But in order to the due exercise of that power, it is in my opinion essential that the beneficiaries to whom the trustees are directed to pay or convey shall have a vested and indefeasible interest in the provisions."

(10.) Accelerating the period of division.

If a bequest of moveables or heritage is left to A, and he predeceases the testator, his heirs take nothing, the bequest

Conditional institution and substitution in bequests.

[1] *Ferrier* v. *Ferriers*, 1872, 10 Macph., 711; see also *Scott* v. *Scott's Executors*, 1877, 4 R., 384.

[2] *Love's Trustees* v. *Love*, 1879, 7 R., 410; and compare *Howat's Trustees* v. *Howat*, 1869, 8 Macph., 337.

[3] 1887, 15 R., 254; rev. 1890, 27 S.L.R., 917.

is ineffectual (unless the *conditio si sine liberis* applies). If, however, a bequest of moveables or heritage is left to A and his heirs, and A predeceases the testator, his heirs will succeed as conditional institutes. A's heirs, if A predeceased the granter, would not take under bonds of provision.[1] But if a bequest of moveables is left to A, whom failing, to B, and A survives the testator, he takes it, and the destination as regards B is evacuated; whereas, under a destination of heritage in the same terms, if A, after the death of the testator, does not dispose, by deed *inter vivos* or *mortis causa*, of the heritage, B, as substitute in the destination, is entitled to it. This difference arises from the principle that there is a presumption against substitution, and in favour of conditional institution, in a destination of moveable estate, whereas there is a presumption in favour of substitution, as opposed to conditional institution, in a destination of heritage. The destination, however, in a moveable succession can be so expressed as to create a substitution. Thus, a legacy may be left to A, and failing him to B, under a declaration that in the event of A surviving the testator, but dying without having received payment of or having assigned the legacy, B will succeed thereto in preference to the nearest of kin and the successors of A, whom the testator in that event expressly secludes from the succession to the same.[2] The words "whom failing" do not import a substitution in a destination of moveables,[3] and it has been remarked that there is only one safe formula for creating a substitution in moveables — namely, by the words "whom failing, either before or after the interest has vested," or words of equivalent meaning.[4] There is also a presumption in favour of conditional institution merely in destinations of mixed succession.[5] In *Paul* a testator disponed to A and B equally

[1] *Russell* v. *Russell*, 1769, M. 6372; and compare *Findlay* v. *Mackenzie*, 1875, 2 R., 909.

[2] Jur. Styles, vol. ii., 567.

[3] *Allan* v. *Fleming*, 1845, 7 D., 908; *Henderson* v. *Hamilton*, 1858, 20 D., 473; *Lockhart* v. *Ross, &c.*, 1814, 6 Pat., 31.

[4] M'Laren on Wills and Successions, vol. i., 632.

[5] *Paul* v. *Home*, 1872, 10 Macph., 937.

between them, and, in the case of the death of either without heirs of his or her body, to the survivor of them, his whole real and personal effects whatsoever. The Court held that, the testator having been survived by both, the share of one who died without leaving a will, and without heirs of his body, went to his heir-at-law, on the ground that in a mixed succession, if possession be once got, and the right obtained by the disponee, there is no presumption of substitution.

IV. Powers of Trustees.—If it is intended that the powers of the trustees should be greater than those conferred on them by statute or at common law, these powers will be stated in the trust-disposition and settlement; for instance, a power of sale of heritage without the consent of the Court or the beneficiaries. The Trusts Acts of 1861,[1] of 1863,[2] of 1867,[3] of 1871,[4] of 1884,[5] and of 1887[6] confer various powers on gratuitous trustees, some of which may be noticed.

Gratuitous trustees.

Gratuitous trustees, in the sense of these Acts, include all trustees who are not entitled as such to remuneration for their services, or who hold the office of trustee *ex officio*, and all trustees, whether original or assumed, who are entitled to receive any legacy, or annuity, or bequest under all trusts constituted by virtue of any deed or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body.[7] Unless the deed or act of nomination stipulates otherwise, these trustees have power—

(1.) Power to resign.

(1.) To resign office, but not if a bequest has been given expressly to them on condition of accepting office. A sole trustee is not entitled to resign office until, with the consent of the beneficiaries of full age, and capable of acting at the time, he has assumed

A sole trustee can resign on certain conditions.

[1] 24 and 25 Vict., c. 84.
[2] 26 and 27 Vict., c. 115.
[3] 30 and 31 Vict., c. 97.
[4] 34 and 35 Vict., c. 27.
[5] 47 and 48 Vict., c. 63.
[6] 50 and 51 Vict., c. 18.
[7] 30 and 31 Vict., c. 97, sect. 1; and 47 and 48 Vict., c. 63, sect. 1.

new trustees, who have accepted office; or he may apply to the Court, stating his wish to resign, and praying for the appointment of new trustees, or of a judicial factor to administer the trust, and on such appointment he can resign. The form of resignation is either a minute of the trust entered into the sederunt book thereof, signed by the resigning trustee and his co-trustee or trustees acting at the time, or a minute of resignation intimated to the other trustee or trustees. The resignation of a trustee who is also an executor infers resignation as executor.[1]

Form of resignation.

(2.) Power to assume new trustees.

Form of assumption.

(2.) To assume new trustees. The form of assuming is by execution of a deed of assumption by the assuming trustee or trustees, or by a quorum of them if more than two. If the signatures of a quorum (*i.e.*, a majority of the trustees accepting and surviving) cannot be obtained to the deed, the consent of the Court is essential. In addition to a general conveyance of the trust-estate, the deed of assumption may contain a special conveyance of heritable property, in which case it may be recorded with a warrant of registration in favour of the assuming and assumed trustees in the Register of Sasines. Trustees appointed by the Court have not power to assume new trustees unless it is conferred on them by the Court.[2]

Executive powers of trustees.

(1.) To appoint factors, &c.

(2.) To discharge trustees resigning.

The Trusts Act, 1867,[3] also authorises gratuitous trustees to do these acts where they are not at variance with the terms or purposes of the trust:—(1.) To appoint factors and law-agents, and to remunerate them. (2.) To discharge trustees who have resigned, and the representatives of trustees who have died; and if these cannot obtain a discharge from the

[1] See 24 and 25 Vict., c. 84, sect. 1; 30 and 31 Vict., c. 97, sects. 10, 18.

[2] See 24 and 25 Vict., c. 84, sect. 1; 30 and 31 Vict., c. 97, sects. 11, 13.

[3] 30 and 31 Vict., c. 97, sect. 2.

acting trustees or the beneficiaries, the Court will grant it.[1] (3.) To grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands and thirty-one years for minerals, and to remove tenants. (4.) To uplift, discharge, or assign debts due to the trust-estate. (5.) To compromise or to submit and refer all claims connected with the trust-estate. (6.) To grant all deeds necessary for carrying into effect the powers vested in them. (7.) To pay debts due by the truster or the trust-estate without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust. The trustees, either with the consent of the Court, which must be satisfied that the powers to be exercised are expedient for the execution of the trust, and not inconsistent with the intention thereof, or with the consent of all the beneficiaries, who for this matter require to be of full age and capable of acting, if the powers to be exercised are not inconsistent with the intention of the trust, have power—(8.) To sell the trust-estate or any part of it. (9.) To grant feus or long leases of the heritable estate or any part of it. (10.) To borrow money on the security of the trust-estate or any part of it. (11.) To excamb any part of the trust-estate which is heritable.

(3.) To grant leases.
(4.) To discharge debts.
(5.) To compromise.
(6.) To grant necessary deeds.
(7.) To pay debts.
(8.) To sell.
(9.) To grant feus or long leases.
(10.) To borrow.
(11.) To excamb.

By the Trusts Act, 1887,[2] trustees have power to make abatement or reduction, either temporary or permanent, of the rent stipulated in any lease of lands let for agricultural or pastoral occupation, or for both purposes, and to accept renunciations of leases of any such subjects; and the same Act declares that no abatement or reduction of rent or acceptance of renunciation of any such leases made by trustees before the passing of the Act shall be held liable to be challenged, which would have been lawful if made after the passing thereof. Repealing section 5 of the Trusts Act, 1867, which dealt with the powers of trustees as regards investments, section 3 of the Trust Acts, 1884, authorises

(12.) To grant abatement of rents.
(13.) To invest.

[1] 30 and 31 Vict., c. 97, sect. 11. [2] 50 and 51 Vict., c. 18.

trustees, unless specially prohibited by the constitution or terms of the trust, to invest the trust-funds—

"(*a.*) In the purchase of—

"1. Any of the Government stocks, public funds, or securities of the United Kingdom:

"2. Stock of the Bank of England:

"3. Any securities the interest of which is or shall be guaranteed by Parliament:

"4. Debenture stock of railway companies in Great Britain incorporated by Act of Parliament:

"5. Preference, guaranteed, lien, annuity, or rent-charge stock, the dividend on which is not contingent on the profits of the year, of such railway companies in Great Britain as have paid a dividend on their ordinary stock for ten years immediately preceding the date of investment.

"6. Stock or annuities issued by any municipal corporation in Great Britain, which annuities, or the interest or dividend upon which stock are secured upon rates or taxes levied by such municipal corporation under the authority of any Act of Parliament:

"7. East India stock, stocks or other public funds of the government of any colony of the United Kingdom approved by the Court of Session, and also bonds or documents of debt of any such government approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer:

"8. Feu-duties or ground-annuals.

"(*b.*) In loans—

"9. On the security of any of the stocks, funds, or other property aforesaid:

"10. On real or heritable security in Great Britain:

"11. On debentures or mortgages of railway companies in Great Britain incorporated by Act of Parliament:

"12. On bonds, debentures, or mortgages secured on rates or taxes levied under the authority of any Act of Parliament by municipal corporations in Great Britain authorised to borrow money on such security:

"13. On Indian railway stock, debentures, bonds, or mortgages on which the interest is permanently guaranteed by the Indian Government and payable in sterling money in Great Britain."

Besides, where trustees are, by the instrument under which they act, empowered to invest trust-funds in the mortgages or bonds of a railway company, or of any other description of company, this implies power to invest such funds in the debenture stock of such company.

V. REVOCATION OF PRIOR SETTLEMENTS.—There is often a clause put into a settlement in these terms:—"I hereby revoke all settlements of a testamentary nature executed by me." Revocation may be express or implied. A testator may have several testamentary writings, all of which will receive effect so far as they are consistent with each other; but if one or several of them are inconsistent with the terms of a deed or deeds of more recent date, the latter, to the extent of the inconsistency, will supersede the former. A question often arises as to the revocability of mutual settlements by one of the parties thereto. Mutual settlements are often made by spouses, but so far as they are not granted for onerous consideration, or in the fulfilment of the natural obligation to make a provision, they are revocable as donations *inter virum et uxorem*.[1]

Revocation express or implied.

Revocability of mutual settlements.

[1] See *Mitchell* v. *Mitchell's Trustees*, 1877, 4 R., 800; *Melville* v. *Melville's Trustees*, 1879, 6 R., 1286; *Beattie's Trustees*, 1884, 11 R., 846; and see also *Lang's Trustees* v. *Lang*, 1885, 12 R., 1265.

VI. Consent to Registration.—This clause is for registration for preservation.

VII. Testing Clause.—This clause is in the usual form. Every holograph writing (which does not require to be attested by witnesses) of a testamentary character is deemed to have been executed of the date it bears in the absence of evidence to the contrary.[1] A parish minister may act as a notary in executing the testamentary deeds of persons in his own parish who are unable to write.[2]

Holograph writings presumed to be of the dates they bear.

Parish minister can execute a testament.

How testaments may be executed by British subjects.

By 24 and 25 Vict., c. 114, a testamentary writing of personal estate, made out of the United Kingdom by a British subject, may be executed according to the forms required (*a*) by the law of the place where the same is made; or (*b*) by the law of the place where the maker is domiciled when the same is made; or (*c*) by the laws then in force in that part of Her Majesty's dominions where the maker had his domicile of origin. A testamentary writing of personal estate made in the United Kingdom by a British subject may be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. Since the passing of the Titles to Land Consolidation Act, 1868,[3] a testamentary deed dealing with heritage may be validly executed in the forms allowed by 24 and 25 Vict., c. 114, with respect to testamentary deeds of personal estate.[4]

It will now be shown how a title to lands is completed under a testamentary deed by

I. Disponees—Trustees or others.
II. Beneficiaries under a Trust.
III. Persons appointed by Court to administer a Trust.

[1] 37 and 38 Vict., c. 94, sect. 40.
[2] *Ibid.*, schedule I.
[3] 31 and 32 Vict., c. 101, sect. 20.
[4] See *Connel's Trustees* v. *Connel*, 1872, 10 Macph., 627.

I. DISPONEES—TRUSTEES OR OTHERS.—*First, When the testator dies with feudalised title.*—(*a.*) If the trust-disposition or other deed in his favour contains a special conveyance, the disponee makes up a title—

(1.) By recording the deed with a warrant of registration; or

(2.) By expeding and recording, with a warrant, a notarial instrument,—Titles to Land Consolidation Act, 1868, schedule (J).

(*b.*) But if the deed in his favour is a general disposition—a conveyance which, from the want of a sufficient description of the lands, or from the absence of the proper feudal clauses, does not of itself constitute a sufficient warrant to the disponee to obtain infeftment directly[1]—the disponee expedes and records a notarial instrument.[2]

Prior to the passing of the Titles Acts of 1858 and 1860, the disponee, under a general disposition which did not contain a procuratory or precept, either (1) got the heir of the last investiture to make up a title to the lands, from whom he then obtained a conveyance, in virtue of which he could enter with the superior by resignation or by confirmation, or (2) obtained a decree of adjudication against such heir. This decree was, as regards feudal subjects, followed by a charter of adjudication from the superior and infeftment thereon, and, as regards burgage subjects, by recorded instrument of resignation and sasine.

If for any reason the disponee under a general disposition now resorts, as he is entitled to do, to an action of constitution and adjudication against the heir of the maker of the general disposition, he will complete his title by recording, with a warrant, his extract decree, or by expeding and recording, with a warrant, a notarial instrument thereon. He cannot now obtain a charter of adjudication, which is a writ by progress.[3]

[1] See Lord Watson in *Studd* v. *Cook*, 1883, 10 R. (H.L.), 53.

[2] 31 and 32 Vict., c. 101, sects. 19, 20, and 37 and 38 Vict., c. 94, sect. 46.

[3] See Bell's Lect., vol. ii., 1001 *et seq.*

Second, when the testator dies with an unfeudalised title.—Whether the trust-disposition or settlement or other deed contains a special or a general conveyance, the disponee makes up a title—

(1.) By expeding and recording with warrant of registration a notarial instrument.[1]

(2.) By recording the conveyance by the person last infeft along with a notarial instrument.[2]

General dispositions, *mortis causa* or *inter vivos*, forming links of series of titles not objectionable on certain grounds.

The Conveyancing Act, 1874, contains certain sections (29, 31, 45, 46, 51) which require notice in this connection. Section 29, which is retrospective, provides that no decree, instrument, or conveyance is invalid because—(1) the series of titles connecting the person obtaining such decree, or expeding such instrument, or holding such conveyance, with the person last infeft, contains as links of the series two or more general dispositions; or (2) because any general disposition forming a part of the series does not contain a clause of assignation of writs. Section 31 makes, as regards the completion of title, a general service expede by an heir alive at or after the commencement of the Act equivalent to a *mortis causa* general disposition of the lands in favour of the heir. The section declares that "when a proprietor has died or shall have died infeft in lands, and the heir of the investiture has expede or shall have expede a general service as heir of such proprietor, the decree of general service in favour of such heir shall be equivalent to a *mortis causa* general disposition of the lands by such proprietor in favour of such heir, to the effect of enabling such heir, or those deriving right from or by succession to him, to expede and record in the appropriate Register of Sasines all notarial instruments applicable to such lands which a general disponee, or those deriving right from him, may expede and record under or in terms of 'The Titles to Land Consolidation (Scotland) Act, 1868,' or of this Act, and that notwith-

A general service equivalent to a general disposition *mortis causa*.

[1] 31 and 32 Vict., c. 101, schedule (J). [2] *Ibid.*, sect. 23, schedule (N).

standing that such proprietor may have died in nonage, or been of insane mind, or laboured under any other disability whatever; provided always that no general service shall have such effect in any case where the heir so served shall have died before the commencement of this Act; and a general service expede by the heir of any person so served, and dying after the commencement of this Act, or by any of the successive heirs of the investiture, or by the heir of any general disponee, shall have the like effect as a transmission of the right to the lands; and any such services shall be sufficient links in the series of titles for the connection of the person expeding such instrument with the person last infeft, in the same manner as is herein-before" (see section 29) "provided with reference to two or more general dispositions forming links in such series." Section 45 enacts that when, by the tenor of the title to any estate in trust duly feudalised in favour of the trustee or trustees therein named, or any of them, the office of a trustee has been or shall be conferred upon the holder of any place or office, or proprietor of any estate, and his successors therein, any person subsequently becoming a trustee shall be deemed to have a valid and complete title by infeftment in the estate, without the necessity of any deed of conveyance or other procedure. If there is no feudal title in the acting trustees, there must be an assignation to the trustee succeeding *ex officio*.

How title completed when the holder of an office or proprietor, *ex officio* a trustee, infeft, and his successor takes the trust.

Section 46 provides that a testamentary writing bequeathing lands within the sense of the Titles to Land Consolidation Act, 1868, section 20, and appointing trustees or executors, and containing words of bequest which are not expressed to be in favour of them, will yet enable them to complete a title by notarial instrument or in any other manner competent to a general disponee. The section, however, does not prevent the grantee to whom the lands are expressly conveyed from completing a title thereto in his own person according to the Titles to Land Consolidation Act, 1868,[1] when the completion

Trustees or executors may complete title when no direct conveyance of lands to them.

[1] See sects. 19, 20.

Probate or letters of administration equivalent to will or extract for completing title.

of such title is not at variance with the purposes or directions of the testamentary writing. Section 51 enacts, "The production to any notary public of the probate of the will or other testamentary settlement of a person deceased, issued by any court of probate in England or in Ireland, or in any British colony or dependency, or of an exemplification of such probate, shall for the purpose of expeding a notarial instrument, or otherwise completing a title to any estate in land or to any heritable security, be held to be equivalent to and as effectual as the production to such notary of the will or settlement itself, or of an extract thereof from the books of Council and Session, and it shall not be competent to institute any challenge of any notarial instrument in respect of the probate or exemplification having been used as the warrant for expeding the same prior to the commencement of this Act." Section 51 has been amplified by section 5 of the Conveyancing Amendment Act, 1887,[1] which provides, "The production to any notary public of letters of administration of the will or other testamentary settlement of a person deceased issued by any court of probate in England or in Ireland, or in any British colony or dependency, or of an exemplification of such letters of administration, shall for the purpose of expeding a notarial instrument, or otherwise completing a title to any estate in land or to any heritable security, be held to be equivalent to and as effectual as the production to such notary of the will or settlement itself, or of an extract thereof from the books of Council and Session; and it shall not be competent to institute any challenge of any notarial instrument in respect of the letters of administration or exemplification thereof having been used as the warrant for expeding the same prior to the commencement of this Act."

When trustees alive.

(1.) Trustees not infeft.

II. Beneficiaries under Trust.—*First. When the trustees are alive.*—(1.) If the trustees are not infeft, they assign

[1] 50 and 51 Vict., c. 69, sect. 5.

the personal title to the beneficiary, who thereon expedes and records a notarial instrument. (2.) If the trustees are infeft, they grant a conveyance to the beneficiary, who records it, or who expedes and records a notarial instrument thereon (3.) But when the testamentary writing contains a conveyance not directly to the trustees or executors named by it but directly to a grantee, the grantee, as pointed out (p. 219), may complete a title in his own person when the completion of such title is not at variance with the purposes or directions of the writing.

(2.) Trustees infeft.

(3.) When direct conveyance to beneficiary in trust-deed.

Second. When the trustees are dead or incapable of acting. —(1.) When any person is entitled to the possession for his own absolute use of any heritable property, the title to which has been taken in the name of (*a*) any trustee; or (*b*) *curator bonis;* or (*c*) factor *loco absentis;* or (*d*) factor *loco tutoris;* or (*e*) judicial factor; or (*f*) other person who has died or become incapable of acting without having executed a conveyance of such property, he can apply by petition to the Court for authority to make up a title in his own name, and an extract of the warrant of Court, specifying and describing the property, is recorded in the Register of Sasines, which completes the title of the beneficiary.[1] (2.) The trust-deed may contain a destination to the survivors and survivor of the trustees, and to the heir of the truster, or the heir of the last survivor of the trustees. In this case the heir, after making up a title as heir of provision by service or otherwise, conveys to the beneficiary, who takes infeftment in virtue of the deed in his favour. (3.) Even when the destination in the trust-deed is limited to the trustees themselves, and does not mention their heirs, it is competent where there is no contrary provision in the deed, and no contrary order is made by the Court of Session, for the heir-at-law of a sole or last surviving trustee, being of full age and not subject to any legal incapacity, to complete a title by service or other-

When trustees dead or incapable of acting.

(1.) Completion of title by means of petition to Court.

(2.) When trust-deed is to trustees and the survivors or survivor of them, and to the heir of the truster, or the heir of the last survivor of the trustees.

(3.) Heir of last trustee may now complete a title, but is not entitled to administer the trust except with the consent of the beneficiaries or under the order of the Court.

[1] 30 and 31 Vict., c. 97, sect. 14; 37 and 38 Vict., c. 94, sects. 45 and 61.

wise to an estate in land possessed by his ancestor *qua* trustee. Under the orders of the Court, or with the consent of the beneficiaries (being all above age, and not subject to any legal incapacity), the heir may administer the trust; otherwise, he has to make over forthwith the lands to—(*a*) any trustee; or (*b*) judicial factor appointed by the Court to administer the trust; or (*c*) any trustee or trustees appointed by one having power under the trust-deed to do so; or (*d*) any person or persons whom the beneficiaries, being all *majores et capaces*, have appointed to carry out the remaining purposes of the trust; or (*e*) the beneficiaries themselves, if the whole trust purposes, except the conveyance of the lands, have been executed.[1] (4.) If the heir, whether called in the destination of the trust-deed or not, declines or is unable to complete a title to the trust-estate in his person, the beneficiaries may raise an action of declaratory adjudication against him. If the last trustee was infeft, the beneficiary in order to complete a title records the decree of declarator and adjudication in the register of sasines; and if the last trustee was not infeft, he expedes and records a notarial instrument.[2]

(4.) Declaratory adjudication.

How person, trustee or judicial factor, appointed by Court completes a title—(1) when trust title feudalised.

III. Person, Trustee or Judicial Factor, appointed by Court to administer a Trust-Estate.—*First, When trust title feudalised.*—When a trust title has been completed and recorded, and any person is subsequently appointed by the Court to administer the trust in whole or in part as a trustee or judicial factor, the interlocutor making the appointment specifies the trust-deed and the other titles, if any, by which the trust title has been completed, refers to the register where such deed or titles are recorded, and sets forth the lands by description or reference. An extract of the interlocutor is recorded in the register of sasines to complete the title of the nominee of the Court.[3]

[1] 37 and 38 Vict., c. 94, sect. 43.
[2] Bell's Lect., vol. ii., 1010, *et seq.*
[3] 37 and 38 Vict., c. 94, sect. 44.

(2) When trust title not feudalised.

Second, When trust title not feudalised.—The Conveyancing Act, 1874, does not apply to this case, but by the Consolidation Act, 1868,[1] a new trustee or a judicial factor appointed by the Court can record the warrant granted in his favour, although the trust title has not been feudalised. The warrant describes the land either particularly or by reference in statutory form.

[1] Sect. 24.

CHAPTER IV.

ENTAILS.

An entail—What?

A DISPOSITION with a destination calling in succession different persons is sometimes called an entail, as is also a disposition with such a destination and prohibitions against alienation, contracting debt, and altering the order of succession. The institutes or substitutes, however, who take in virtue of the last-mentioned dispositions are fiars, and they can dispose of the estate. An entail, strictly so called, is a disposition of lands containing, expressly or constructively, in addition to the ordinary feudal clauses of a disposition — (1) a destination to a special series of heirs; (2) prohibitory clauses against (*a*) alienation, (*b*) contracting debt, and (*c*) altering the order of succession; (3) an irritant clause, which annuls the deed prohibited; and (4) a resolutive clause, which annuls the right of the heir contravening the provisions of the entail.[1] By section 43 of the Rutherfurd Act [2] an entail defective in any one prohibition is, from and after the passing of the Act, invalid as regards all the prohibitions.[3] Under a strict entail an institute or a substitute is unable, unless in so far as authorised by the deed or by statute, to contravene the entail for an onerous or a gratuitous consideration; but if the fetters of the entail bind "the heirs of entail only," they will bind neither the institute nor a proper conditional institute.[4]

[1] 1685, c. 22; 11 and 12 Vict., c. 36, sect. 39; 21 and 22 Vict., c. 76, sect. 18; 31 and 32 Vict., c. 101, sect. 14.

[2] 11 and 12 Vict., c. 36.

[3] See *Duke of Hamilton* v. *Lord Charles Hamilton*, 1868, 7 Macph., 139; aff. 1870, 8 Macph. (H.L.), 48.

[4] *Edmonstone* v. *Edmonstone*, 1769, M. 4409, rev. 1771, 2 Pat., 255; *Maxwell* v. *Logan*, 1836, 15 S., 291; aff. 1839, M'L. and Rob. App., 790.

e ordinary subjects of entails are lands. The maker of ail need not have a feudalised title to lands; a personal s sufficient.[1] Title to make an entail.

ails were first sanctioned by the Act 1685, c. 22; and from 1685 to 1st August, 1848,[2] a strict entail had to contain, over and above the usual clauses and solemnities of an ordinary feudal disposition—(1) a destination calling a special series of heirs; (2) prohibitory clauses against (*a*) alienation, (*b*) contracting debt, and (*c*) altering the order of succession; (3) irritant clause; and (4) resolutive clause. Form of entail from 1685 to 1848.

By the Rutherfurd Act of 1848[2] it was provided that, if an entail contained an express clause authorising registration in the Register of Entails, irritant and resolutive clauses did not require to be inserted in it. Form from 1848 to 1858.

By the Titles to Land Acts of 1858 and 1860[3] it was provided that, if an entail contained an express clause authorising registration of it in the Register of Entails, prohibitory clauses did not require to be inserted in it. Accordingly a clause authorising registration in the Register of Entails,—which is in these terms—"And I grant full power to . . . as my procurators, or to any of the heirs of entail foresaid, to cause present these presents before the Lords of Council and Session judicially, and procure the same recorded in the Register of Entails, and that at the expense of the heir of entail in possession at the time"[4]—has had, since the commencement of the Titles Acts, the operation and effect of prohibitory clauses fenced by irritant and resolutive clauses. From 1858 onwards.

An entail, therefore, as regards form now requires, in addition to the usual clauses and solemnities only—(1) a special destination to heirs, and (2) a clause authorising registration of the entail in the Register of Entails.[5] Present form.

This is in accordance with section 14 of the Titles to Land Consolidation Act, 1868, which provides—"Where a deed of

[1] Bell's Prin., sect. 1722.
[2] 11 and 12 Vict., c. 36.
[3] The provisions of these Acts were consolidated by 31 and 32 Vict., 101, sect. 14.
[4] Jur. Styles, vol. i., 243.
[5] *Ibid.*, vol. i., 247.

entail contains an express clause authorising registration of the deed in the Register of Tailzies, it shall not be necessary to insert clauses of prohibition against alienation, contracting debt, and altering the order of succession, and irritant and resolutive clauses, or any of them ; and such clause of registration contained in any deed of entail of lands not held by burgage tenure dated on or after the 1st day of October 1858, or of lands held by burgage tenure dated on or after the 10th day of October 1860, shall have in every respect the same operation and effect as if such clauses of prohibition, and such irritant and resolutive clauses, had been inserted in such deed of entail, any law or practice to the contrary notwithstanding."

Entail must be recorded and feudalised.

To the completion of an entail, it is and always has been necessary (1) to record it, at the sight of the Court, in the Register of Entails ; and (2) to feudalise it. A petition is presented to the Court praying for warrant to record the deed of entail in the Register of Entails. Infeftment is now taken on an entail either by recording it in the Register of Sasines, or by expeding and recording a notarial instrument. If a notarial instrument is expede, it will contain the conditions of the entail *ad longum*.

Insertion of conditions, &c., by reference.

Before 1847.

After 1847.

In making up titles to an heir-substitute under a feudalised entail before the passing of the Conveyancing Acts of 1847, the destination and the prohibitory, irritant, and resolutive clauses had to be set forth at length in the instrument of sasine. After these Acts came into operation, it was sufficient to refer to the prohibitory, irritant, and resolutive clauses as they were set forth in the deed of entail recorded in the Register of Entails, or in any instrument or deed recorded in the appropriate Register of Sasines, and forming part of the progress of titles of the lands.

After 1858.

After the Titles to Land Acts of 1858 and 1860 reference could also be made in the same manner to the destination in the making up of title. The law as to the incorporation by reference of the destination and fetters of entails is summed up in section 9 of the Titles to Land Consolidation Act, 1868, which runs thus: "It shall

not be necessary in any conveyance or deed of or relating to lands held under a deed of entail, or of or relating to lands obtained by excambion in exchange for lands held under any deed of entail, or of or relating to lands purchased or acquired for the purpose of being added to any estate held under any deed of entail, or entailed on the heirs and under the conditions specified in any deed of entail, to insert the destination of heirs, or the conditions, provisions, and prohibitory, irritant, and resolutive clauses, or clause authorising registration in the Register of Tailzies, contained in any such deed of entail; provided the same shall in such conveyance or deed be specially referred to as set forth at full length in such deed of entail recorded in the Register of Tailzies, if the same shall have been so recorded, or as set forth at full length in any conveyance or deed recorded in the appropriate Register of Sasines, and forming part of the progress of title-deeds of the said lands held under such deed of entail, such reference being made, as nearly as may be, in the terms set forth in schedule (C) hereto annexed; and the reference to such destination, or to such conditions, provisions, and prohibitory, irritant, and resolutive clauses, or clause authorising registration in the Register of Tailzies, if so made in any such conveyance or deed, whether dated prior or subsequent to the commencement of this Act, shall be equivalent to the full insertion thereof, and shall, to all intents and in all questions whatever, whether *inter hæredes* or with third parties, have the same legal effect as if the same had been inserted exactly as they are expressed in the recorded deed of entail, conveyance, or deed referred to, notwithstanding any law or practice to the contrary, or any injunction to the contrary contained in such deed of entail, or any enactments or provisions to the contrary contained in an Act of the Parliament of Scotland made in the year 1685, intituled 'An Act concerning Tailzies,' or in any other Act or Acts of the Parliament of Scotland or of Great Britain, or of the United Kingdom of Great Britain and Ireland, now in force."

Contravention of entail.

If an heir of entail contravenes the conditions of the entail, any substitute, however remote, can have the irritancy declared during the contravener's lifetime, and the next heir makes up a title by serving heir to him who died last infeft in the fee, and did not contravene. The prohibitions of an entail are enforced by means of a declarator of irritancy, which seeks to have it declared that all right of the contravener is extinct; and deeds of contravention can be reduced. A decree of irritancy must be obtained before a decree of reduction is taken.[1] If restitution is possible, an heir of entail may purge a contravention arising either from failure to insert properly the fetters in his titles, or from a direct breach of the fetters.[2]

How entail extinguished.

An entail may be brought to an end in different ways.

1. Disentail under statute.

1. By far the most important way of extinguishing an entail is by using the powers of disentail given by statute, and recording an instrument of disentail in the Register of Tailzies.[3] An heir of entail, of full age, in possession under an old entail—that is, an entail dated prior to 1st August 1848—can disentail the entailed estate, wholly or partly, by recording in the Register of Entails, under the authority of the Court, an instrument of disentail—

Disentail of old entails.

(1.) If born on or after 1st August 1848, he can disentail without consent of any heir.

(2.) If born before 1st August 1848, he can disentail with consent of the heir-apparent under the entail born after 1st August 1848, twenty-one years of age, and not subject to any legal incapacity. The term "heir-apparent" under the Entail Amendment Act, 1848,[4] means the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect.

[1] Rankine on Land Ownership, 574, and authorities here cited.

[2] *Abernethie* v. *Gordon*, 1837, 15 S., 1167; aff. 1840, 1 Rob. App., 434.

[3] 11 and 12 Vict., c. 36; 16 and 17 Vict., c. 94; 38 and 39 Vict., c. 61; and 45 and 46 Vict., c. 53.

[4] 11 and 12 Vict., c. 36, sect. 52.

(3.) Irrespective of the date of his birth he can disentail,—

(*a.*) Without consent, if he is the only heir in existence for the time; or

(*b.*) With consent of the whole heirs of entail, if there be less than three in being; or

(*c.*) With the consent of the three nearest heirs entitled in their order successively to succeed; or

(*d.*) With the consent of the heir-apparent, and of the heir or heirs, in number not less than two, including such heir-apparent, who in order successively would be heir-apparent. In each of the last three cases the next heir giving consent must be twenty-one years of age, and not subject to any legal incapacity.

Disentail of new entails.

Prior to the Entail (Scotland) Act, 1882,[1] an heir of entail, of full age, in possession under a new entail—that is, an entail dated on or after 1st August 1848—could disentail at the sight of the Court—

(1.) If born after the date of entail, without any consent; and

(2.) If born before the date of the entail, with consent of the heir-apparent under the entail, twenty-one years of age, not subject to any legal incapacity, and born after the date of the entail. But by section 3 of that Act the heir in possession can disentail—

(*a.*) Without consent, if he is the only heir of entail in existence; or

(*b.*) With the like consents as are required by the third section of the Entail Amendment Act, 1848, in the case of entails dated prior to 1st August 1848. These consents are set forth in the preceding paragraphs under (3), (*b*), (*c*), (*d*).

[1] 45 and 46 Vict., c. 53.

Consents can be valued.

The Entail (Scotland) Act, 1882,[1] makes provision for valuing in money the interest in the estate of an heir-apparent or other nearest heir, if his consent cannot be obtained to an application for disentail by the heir in possession. Prior to 1882, the interest of any heir, other than the heir-apparent or other nearest heir, could be valued, and his consent dispensed with.[2]

Effect of recorded instrument of disentail.

When an instrument of disentail is recorded in the Register of Entails, it has the effect of absolutely freeing the estate from the fetters of the entail, and of entitling the heir in possession to do any act in relation thereto competent to an absolute proprietor in fee-simple. It does not defeat rights affecting the fee or rents held by third parties, or by the heir in possession, or his successors, other than the rights and interests of the heirs-substitute of entail in or through the tailzie.[3] It does not evacuate the destination in the entail. If the heir in possession does not alter the destination by *inter vivos* or *mortis causa* deed, the estate will go on his death to the next substitute in the destination of the entail.[4]

2. Disentail by heirs of entail dying out.

2. An entail is also extinguished when—(1.) the estate devolves on the last substitute called under the deed of entail. (2.) Where the destination contained in an entail is in favour of the institute and his heirs whomsoever, or his heirs general, such estate is deemed to be a fee-simple estate, without any declarator or other judicial process.[5]

3. Disentail by succession of heirs-portioners.

3. The devolution of the estate on heir-portioners ends an entail.[6]

4. Disentail by prescriptive possession on fee-simple title.

4. If there has been prescriptive possession on a fee-simple title, or on a title which is made up in virtue of the entail, but in which the fetters of the entail have not been inserted either *ad longum* or by reference, the entail will be extinguished.[7]

[1] Sect. 13.
[2] 38 and 39 Vict., c. 61, sect. 5.
[3] 11 and 12 Vict., c. 36, sect. 32.
[4] *Gray* v. *Gray's Trustees*, 1878, 5 R., 820.
[5] 38 and 39 Vict., c. 61, sect. 13.
[6] *Mure* v. *Mure*, 1837, 15 S., 581; aff. 1838, 3 S. and M'L. App., 237.
[7] Bell's Lect., vol. ii., 1047 *et seq.*

Power given by statute to heirs.

Not only do entails often contain a relaxation of the general prohibitions, but by a series of statutes heirs of entail have power, under conditions, to sell superiorities, to grant leases, to make improvements, to excamb, to sell for entailer's debts, to make provision to wives, or husbands, and children, to redeem land tax, &c.[1] The Entail (Scotland) Act, 1882, confers these important powers:—(1.) A creditor of an heir of entail in possession, who can disentail a new entail without consent, is able to attach the estate for debt, as if an instrument of disentail had been duly executed and recorded.[2] A creditor could, in virtue of section 11 of the Rutherfurd Act of 1848, attach an estate under an old entail when the heir in possession required no consent to disentail, as if an instrument of disentail had been duly executed and recorded. (2.) It enables creditors of any heir in possession, who is entitled to disentail, with the consent of any other heir or heirs, or upon such consent being dispensed with by the Court, or a trustee in a sequestration taken out for debt, to enforce a disentail.[3] (3.) Application can be made to the Court for an order of sale of the estate or part of it—(*a*) by the heir in possession of any entailed estate; or (*b*) where an entailed estate consists of land held in trust for the purpose of being entailed by the person who, if the land had been entailed, would have been the heir in possession; or (*c*) by the tutors, curators, or administrators of such heir or other person.[4] Unless it appears that any patrimonial interest would be injuriously affected by the sale, the Court shall order the estate, or part of it, to be sold in such manner as they think proper. The price, or the surplus of it, if debts have to be paid, is regarded as a surrogate for the entailed estate.

[1] Bell's Prin., sects. 1762-1774.
[2] See sects. 3 and 18.
[3] Sect. 18.
[4] Sect. 19.

CHAPTER V.

HEIRS-AT-LAW; HEIRS OF PROVISION; HEIRS OF PROVISION AND TAILZIE; SPECIAL SERVICES; GENERAL SERVICES; SPECIAL AND GENERAL SERVICES COMBINED; WRITS AND PRECEPTS OF *CLARE CONSTAT;* PETITIONS FOR COMPLETING TITLE UNDER CONVEYANCING ACT, 1874, SECTION 10; CASES OF *HUTCHISON* AND OF *MAULE;* CHARTERS OF *NOVODAMUS;* DOUBLE TITLES AND SOPITING OF TITLES; LIABILITY OF HEIR FOR ANCESTOR'S DEBTS; DISTINCTION BETWEEN CONQUEST AND HERITAGE ABOLISHED.

Heirs-at-law, heirs of provision, and heirs of provision and tailzie.

HEIRS-AT-LAW, AND OF PROVISION, AND OF PROVISION AND TAILZIE.—In reference to the completion of title, heirs may be divided into three classes—(1) heirs-at-law; (2) heirs of provision; and (3) heirs of provision and tailzie. If a destination in a conveyance is to A, or to A and his heirs, or to A and his heirs whomsoever, the heir in heritage of A makes up a title *qua* heir-at-law; but if the destination is to A and a particular series of heirs—*e.g.*, to A and the heirs of his body—the heir called makes up a title *qua* heir of provision; or, in the case of an entail, *qua* heir of provision and tailzie. Heirs of provision, or of provision and tailzie, are said to succeed *provisione hominis;* and heirs-at-law *provisione legis.* Before the Conveyancing Act, 1874,[1] the proper character of the heirs had to be set forth accurately in the

Error in character in which heir entered not to affect service.

[1] 37 and 38 Vict., c. 94.

services in their favour, otherwise they were inept, unless the character in which service was expede necessarily implied the character in which it ought to have been taken.[1] Precepts or writs of *clare constat*, however, if granted to the heirs entitled to succeed, were effectual although their character was not set forth accurately. But by the Conveyancing Act, 1874,[2] which is in this respect retrospective, it is no objection to (*a*) Crown precepts or writs of *clare constat;* (*b*) precepts or writs of *clare constat* granted by a subject-superior; (*c*) decrees of special service; (*d*) writs of acknowledgment; (*e*) any other decree; or (*f*) to any petition for completion of title, that the character of the heir is erroneously stated therein, provided such heir was in truth entitled to succeed to the heritable property specified in the precept, writ, decree, or petition; and (*g*) if an heir entitled to expede a general service expedes it in a wrong character, it will yet be valid.[3]

Estates in land now vest in heir-at-law or heir of provision without service.

Prior to the Conveyancing Act, 1874, feudal rights, with a few exceptions, did not vest *ipso jure* in an heir on the death of his ancestor. These exceptions included allodial lands, leases,[4] and honours and dignities. By section 9 of the Conveyancing Act, 1874, a personal right to every estate in land descendible to heirs vests *ipso jure* in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, whether such person died before or after the commencement of the Act, provided the heir was alive at the date of the commencement of the Act, if such person died before that date.[5] On his ancestor's death an heir without completing a title can dispose of the estate, and it can be attached for his debts during his life or after his death. But no right or disposition made by the heir, so far as it may prejudice his ancestor's creditors, is valid unless made and granted a full year after the ancestor's death.[6] The provisions of section 9 making a personal right to estate in land descendible to

Result of *ipso jure* vesting.

[1] See Menzies, 797.
[2] Sect. 11.
[3] See Begg's Conveyancing Code, 339; Sturrock's Analysis, 64.
[4] See Mowbray's Hendry's Styles.
[5] Begg's Conveyancing Code, 331; Sturrock's Analysis, 57.
[6] 1661, c. 24.

heirs applies to heirs of provision and to heirs of provision and tailzie, as well as to heirs-at-law. Thus in the case of *M'Adam* v. *M'Adam*[1] a substitute in an entail survived the heir of entail last infeft, granted under the powers of the Aberdeen Act[2] a bond of annuity in favour of his widow, and died without having made up a title to the entailed estate. It was held that he had a right and title to grant the bond. In giving judgment Lord President Inglis remarked: —"Now what is the position of the owner of a personal right to land? He can sell it; his creditors can attach it during his life, or, I apprehend, after his death. Of course that is not the case with an entailed estate. But the enactment is obviously intended to apply to every estate descendible to heirs, and no estate so emphatically answers that description as an entailed estate. The heir is therefore in the same position as if he held a conveyance to the entailed estate. That is quite an intelligible position. We are familiar with such conveyances, if in no other form, in the form of a deed of propulsion. He is then in the position of a disponee to the entailed estate—of course subject to the fetters; and in so far as these apply and bind him, he cannot contract obligations which will be effectual against the estate or the heirs. But in so far as he is not fettered he is free—free to the extent to which the fetters are relaxed, either by powers in the deed or by force of statute."

Infeftments, public and base, and personal titles.

If a proprietor died prior to the Conveyancing Act, his title to land held by feu or blench tenure might be in one of three conditions. It might be (1) a public infeftment—an infeftment confirmed by the superior, or an infeftment the warrant of which was granted by the superior; or (2) a base infeftment—one not confirmed by the superior; or (3) an unfeudalised title—one on which no infeftment, or an inept infeftment, which is equal to no infeftment, had followed. If land was held by burgage tenure, the title might be either

[1] 1879, 6 R., 1256.

[2] 5 Geo. IV., c. 87, sect. 1.

(1) a public infeftment; or (2) an unfeudalised title: in the case of burgage subjects there was no base infeftment. By the Conveyancing Act, 1874, base infeftment was abolished, infeftment implying entry with the superior. A proprietor of land—feu, blench, or burgage—can therefore now have either (1) a public or feudalised title; or (2) an unfeudalised title; or (3) a personal right in virtue of the Conveyancing Act, 1874.[1]

Proprietor can now have a feudalised or unfeudalised title, or a personal right to lands.

How an heir made up a title before the commencement of the Conveyancing Act, 1874, and how he makes up a title since, is shown in the following Tables:—

[1] Sect. 9.

I.—WHERE THE CROWN THE SUPERIOR.

	1. Ancestor's Infeftment Public.	2. Ancestor's Infeftment Base.	3. Ancestor's Title Unfeudalised.	4. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
Before 1847, *i.e.*, before passing of Service of Heirs Act (10 and 11 Vict., c. 47), and Crown Charters Act (10 and 11 Vict., c. 51).	(1.) Special service following on brieve of inquest. (2.) Precept from Chancery, which was directed prior to 1845 to the sheriff of county in which lands were situated, after 1845 to any notary public, and which was warrant for sasine till Whitsunday or Martinmas next after its date. (3.) Instrument of sasine, recorded before 1845 within sixty days of its date, and after 1845 before the first term of Whitsunday or Martinmas after date of precept.	Here the heir had to take up, *first*, mid-superiority remaining in ancestor's author; *second*, property vested in ancestor; and, in the *third* place, he had to unite the two fees, which he did thus:— First. *Mid-superiority.* (1.) General service to take up unexecuted procuratory in ancestor's title. (2.) Crown charter of resignation on said procuratory. (3.) Instrument of sasine on charter. Second. *Property.* (1.) Precept of *clare constat* by heir as mid-superior in favour of himself as heir in property. (2.) Instrument of sasine on precept, recorded. Third. *Consolidation of Two Fees.* (1.) Procuratory of resignation *ad remanentiam* by himself in his own favour. (2.) Instrument of resignation *ad remanentiam* thereon, recorded within sixty days of its date.	Here the heir could make up a title either by confirmation or by resignation. 1. *By Confirmation.* (1.) General service, which gave right to all unexecuted warrants. (2.) Instrument of sasine narrating ancestor's title, and deducing service, recorded. (3.) Crown charter of confirmation. 2. *By Resignation.* (1.) General service. (2.) Crown charter of resignation. (3.) Instrument of sasine on charter.	
After Acts of 1847, *supra*.	1. *Under* 10 *and* 11 *Vict.*, *c.* 51. (1.) Service, general or special, following on petition.	1. *Under* 10 *and* 11 *Vict.*, *c.* 51. (1.) General service.		

1. Crown Charters Act.	(2.) Precept from Chancery, which was directed to any notary public, and which was warrant for infeftment till Whitsunday or Martinmas next after its date. (3.) Instrument of sasine recorded. or, 2. *Under* 10 *and* 11 *Vict.*, *c.* 47.	(2.) Charter of confirmation (which confirmed the lands and disposition and sasine in favour of the ancestor) and precept of ~~sasine~~ in favour of heir. The charter and precept were combined. (3.) Instrument of sasine on precept, recorded. or, 2. *Under* 10 *and* 11 *Vict.*, *c.* 47.	As above.	
2. Service of Heirs Act.	(1.) Extract decree of special service, which contained a precept of sasine. (2.) Instrument of sasine, recorded. (3.) Crown charter of confirmation.	(1.) Extract decree of special service, which contained a precept of sasine. (2.) Instrument of sasine, recorded. (3.) Crown charter of confirmation, which confirmed the ancestor's and the heir's sasines and their warrants, or the lands and the heir's sasine.		
After Titles to Land (Scotland) Act, 1858, (superseded by Consolidation Act, 1868).	1. (1.) Service, general or special. (2.) Crown writ (or precept) of *clare constat*, recorded before the first term of Whitsunday or Martinmas next after its date. or, 2. (1.) Extract decree of special service, recorded. (2.) Crown writ (or charter) of confirmation.	1. (1.) General service. (2.) Crown writ (or precept) of *clare constat*, recorded, operating confirmation of all prior unconfirmed deeds. or, 2. (1.) Extract decree of special service, recorded. (2.) Crown writ (or charter) of confirmation.	1. *By Confirmation.* (1.) General service. (2.) Ancestor's title and notarial instrument, both recorded, or a notarial instrument (recorded) setting forth, *ad longum*, ancestor's title and general service. (3.) Crown writ (or charter) of confirmation. 2. *By Resignation.* (1.) General service. (2.) Ancestor's disposition, along with Crown writ of resignation (specifying service as connecting title), recorded with warrant of registration in favour of heir; or separate charter of resignation, recorded.	

I—WHERE THE CROWN THE SUPERIOR—*continued.*

	1. Ancestor's Infeftment Public.	2. Ancestor's Infeftment Base.	3. Ancestor's Title Unfeudalised.	4. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
After Conveyancing Act, 1874.	1. (1.) Extract decree of special service, recorded; or notarial instrument (recorded) on the decree. or, 2. (1.) Extract decree of general service, which has the effect (since the Conveyancing Act, 1874, section 31) of a general disposition *mortis causa*, by the proprietor last infeft, in favour of the heir. (2.) Notarial instrument (recorded). or, 3. (1.) Service, general or special. (2.) Crown writ (or precept) of *clare constat*, recorded before the first term of Whitsunday or Martinmas next after its date.	Base infeftment abolished by Conveyancing Act, 1874, section 4 (2); infeftment since that date implying entry with the superior.	(1.) General service. (2.) Notarial instrument (recorded) on ancestor's title and general service; or ancestor's title and notarial instrument, both recorded.	Extract decree on petition under section 10, recorded.

II.—WHERE SUBJECT THE SUPERIOR.

	1. Ancestor's Infeftment Public.	2. Ancestor's Infeftment Base.	3. Ancestor's Title Unfeudalised.	4. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
Before 1847, *i.e.*, before the Service of Heirs Act, 10 and 11 Vict., c. 47.	(1.) General service, if demanded by superior to prove heir's propinquity or right to succeed. (2.) Precept of *clare constat* from superior, directed, prior to 1845, to superior's bailies; after 1845, to any notary public. (3.) Instrument of sasine thereon, recorded.	(1.) General service, if demanded by superior to prove heir's propinquity or right to succeed. (2.) Charter of confirmation (which made ancestor's title public) and precept of *clare constat* combined. (3.) Instrument of sasine (recorded) on precept of *clare constat*.	1. *By Confirmation.* (1.) General service, which gave right to all unexecuted warrants. (2.) Instrument of sasine (recorded), narrating ancestor's title and deducing service. (3.) Charter of confirmation from superior. or, 2. *By Resignation.* (1.) General service. (2.) Charter of resignation from superior. (3.) Instrument of sasine (recorded) on charter.	
After Service of Heirs Act, 1847, *supra*.	1. (1.) Extract decree of special service, which contained a precept of sasine. (2.) Instrument of sasine, recorded. (3.) Charter of confirmation from superior. or, 2. (1.) General service, if demanded by superior. (2.) Precept of *clare constat* from superior. (3.) Instrument of sasine (recorded) on precept.	1. (1.) Extract decree of special service. (2.) Instrument of sasine, recorded. (3.) Charter of confirmation of lands and heir's sasine. or, 2. (1.) General service, if required. (2.) Charter of confirmation and precept of *clare constat* combined. (3.) Instrument of sasine (recorded) on precept.	As above.	

II.—WHERE SUBJECT THE SUPERIOR—*continued.*

	1. Ancestor's Infeftment Public.	2. Ancestor's Infeftment Base.	3. Ancestor's Title Unfeudalised.	4. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
After Titles to Land (Scotland) Act, 1858 (superseded by Consolidation Act, 1868).	I. (1.) Extract decree of special service, recorded. (2.) Writ (or charter) of confirmation from superior. or, 2. (1.) General service, if required. (2.) Writ (or precept) of *clare constat* from superior, recorded.	1. (1.) Extract decree of special service, recorded. (2.) Writ (or charter) of confirmation from superior. or, 2. (1.) General service, if required. (2.) Writ (or precept) of *clare constat* from superior recorded, operating confirmation of all prior unconfirmed deeds.	1. *By Confirmation.* (1.) General service. (2.) Ancestor's title and notarial instrument, both recorded; or notarial instrument setting forth, *ad longum*, ancestor's title and general service, recorded. (3.) Writ (or charter) of confirmation from superior. or, 2. *By Resignation.* (1.) General service. (2.) Ancestor's disposition, along with writ of resignation (specifying service as connecting title) recorded with warrant of registration in favour of heir; or separate charter of resignation recorded.	
After Conveyancing Act, 1874.	1. (1.) Extract decree of special service, recorded, or notarial instrument (recorded) on the decree. or, 2. (1.) Extract decree of general service, which has the effect (since the Conveyancing Act, 1874, section 31) of a general disposition *mortis causa*, by the proprietor last infeft, in favour of the heir. (2.) Notarial instrument (recorded) on decree. or, 3. (1.) General service, if demanded. (2.) Writ (or precept) of *clare constat*, recorded, or a notarial instrument (recorded) on writ (or precept).	Base infeftment abolished by Conveyancing Act, 1874, section 4 (2); infeftment since that date implying entry with the superior.	(1.) General service. (2.) Notarial instrument (recorded) on ancestor's title and general service, or ancestor's title and short notarial instrument, both recorded.	Extract decree on petition under section 10 recorded.

	1. Ancestor's Title Feudalised.	2. Ancestor's Title Unfeudalised.	3. Ancestor having personal right under Conveyancing Act, 1874, Section 9.
Before 1845, *i.e.*, prior to 8 and 9 Vict., c. 35.	(1.) Claim to bailies of the burgh. (2.) Symbolical delivery of subjects on lands. (3.) Instrument of cognition and sasine recorded in the burgh register within sixty days of its date.	(1.) General service. (2.) Instrument of resignation and sasine (recorded) on ancestor's title and general service.	
After infeftment Act of 1845, 8 and 9 Vict., c. 35.	(1.) Claim. (2.) Symbolical delivery of subjects on lands, or by delivery of new in Council Chambers. (3.) Instrument of cognition and sasine, recorded.	As above.	
After Titles Act of 1860 (which was superseded by Consolidation Act, 1868).	1. As above ; or, 2. (1.) Writ of *clare constat*, which, prior to Consolidation Act, was signed by the provost and bailies, or a quorum of them, and thereafter by the provost and town-clerk, recorded. or, 3. (1.) Extract decree of special service recorded.	1. (1.) General service. (2.) Notarial instrument (recorded) on ancestor's title and service, or ancestor's title and short notarial instrument, both recorded. or, 2. (1.) General service. (2.) Instrument of resignation and sasine recorded.	
After Conveyancing Act, 1874.	1. (1.) Extract decree of special service recorded in the burgh register, or notarial instrument (recorded) on the extract decree. or, 2. (1.) Extract decree of general service, under section 31 of Conveyancing Act, 1874. (2.) Notarial instrument recorded. or, 3. (1.) Writ of *clare constat* recorded, or a notarial instrument on writ recorded.	(1.) General service. (2.) Notarial instrument recorded, or ancestor's title and short notarial instrument, both recorded.	(1.) Extract decree on petition under Conveyancing Act, 1874, section 10, recorded.

A few remarks may be made on—

I. Special Services.
II. General Services.
III. Special and General Services combined.
IV. Writs and Precepts of *Clare Constat.*
V. Petitions under Conveyancing Act, 1874, sect. 10.
VI. Cases of *Hutchison,* and of *Maule.*
VII. Charters of *Novodamus.*
VIII. Double Titles and sopiting of Titles.
IX. Liability of heir for ancestor's Debts.

Special service —when used.

I. Special Services.—From the above table it will be noticed that before 1847 a special service was an essential step in getting a Crown precept of Chancery, and that since 1847 special service has been used for one of two purposes—either to instruct an heir's right to an ancestor's estate, the title to which was feudalised, or to enable the heir to take up lands in which an ancestor died infeft. If an heir holding an unfeudalised special service died before the passing[1] of the Titles to Land Consolidation Act, 1868, nothing vested in him in virtue thereof.[2] Since then an unfeudalised decree of special service has been equivalent to an unrecorded conveyance in favour of the holder.[3] A petition for special service sets forth—(1) the death of the ancestor; (2) a particular description, or a description by reference, of the lands vested in the ancestor, and the burdens thereon, if any; (3) the ancestor's title; (4) the petitioner's propinquity, and if the petitioner is an heir of provision, or of provision and tailzie, the deed under which he has right.[4] The petition is presented to the sheriff within whose jurisdiction the lands or the burgh containing the lands in which the ancestor died infeft are situated, or, in the option of the petitioner, to the Sheriff of Chancery, and in the event of the lands being in more counties than

Effect of an unfeudalised special service before and after Consolidation Act, 1868.

Contents of petition.

To whom petition presented.

[1] 31st July 1868.
[2] *Moreton's Trustees* v. *Moreton,* 1854, 16 D., 1108.
[3] 31 and 32 Vict., c. 101, sect. 46.
[4] *Ibid.,* sect. 29, schedule (Q).

one, or in more burghs than one, if such burghs are in different counties, then to the Sheriff of Chancery.[1] When an heir is served to an ancestor in several separate lands under the same petition, it is competent to obtain separate extract decrees under the same petition, applicable to one or more parcels of such lands, provided a prayer to that effect is inserted in the petition.[2]

Separate extract decrees under one petition.

II. GENERAL SERVICES.—As is shown by the table, general service was used for two purposes before the Conveyancing Act, 1874, came into operation—either to instruct an heir's right to succeed to his ancestor's estate, or to take up an unfeudalised title in the ancestor's person. The Conveyancing Act, 1874,[3] has made a decree of general service expede by a person dying after the commencement of the Act equivalent to a *mortis causa* general disposition of the lands in which a proprietor died infeft in favour of such heir expeding it. Therefore general service can now be used by an heir for three purposes—(1) to instruct title; (2) to take up an unfeudalised title to land; and (3) to take up a feudalised title. An unfeudalised title to land was and is effectually vested in an heir by a general service. The contents of a petition for general service are—(1) the date of the death of the ancestor; (2) the ancestor's domicile; or, if the ancestor died upwards of ten years before the date of the petition, and the petitioner cannot ascertain the place of his domicile, a statement that the domicile is unknown; (3) the petitioner's propinquity, and if the petitioner is an heir of provision, or of provision and tailzie, the deed under which he has right.[4] A petition of general service is presented to the Sheriff of the county within which the deceased had at the date of his death his domicile, or, in the option of the petitioner, to the Sheriff of Chancery, and if the deceased had at the date of

General service —when used.

Effect of a general service.

Contents of petition.

To whom presented.

[1] 31 and 32 Vict., c. 101, sects. 27, 28.
[2] *Ibid.*, sect. 36.
[3] 37 and 38 Vict., c. 98, sect. 31; Begg's Conveyancing Code, 368; Sturrock's Analysis, 107.
[4] 31 and 32 Vict., c. 101, sect. 29, schedule (P).

his death no domicile within Scotland, or if his domicile is unknown, then to the Sheriff of Chancery.[1] In the completion of a title of an heir an extract decree of general service is only a link or midcouple.

Special and general services combined.

III. Special and General Services combined.—Prior to the Service of Heirs Act, 1847,[2] a special service implied a general service in the same character. For example, if an heir of line expede, before 1847, a special service to a particular estate, the service carried the property contained in the service, and also all personal rights which descended to the heir of line.[3] But by the Service of Heirs Act, 1847,[4] it was enacted that no special service should imply a general service except as to the property contained in it; and that an heir of line or heir-male might petition for a general service along with the special.[5] But now in any petition for special service, in whatever character, it is competent to the petitioner to pray for general service in the same character as that in which special service is sought.[6]

Writs and precepts of *clare constat*—when used.

IV. Writs and Precepts of *Clare Constat*.—An heir at law, or of provision, or of tailzie and provision, of a proprietor who dies infeft in lands may also complete his title by recording a writ or precept of *clare constat* granted by the superior, or by expeding and recording a notarial instrument thereon. Writs of *clare constat* were introduced by the Titles Act, 1858. A precept differs from a writ in containing a precept of sasine, on which it is competent to expede and record an instrument of sasine in the form of schedule (B) of the Infeftment Act, 1845.[7] Subject superiors are bound to grant writs of *clare constat*, if required by the heir entitled to demand the same, provided always that the heir, if required, produce a charter or other

Writs—when introduced.

Difference between precept and writ.

Subject superiors bound to grant writs if required by heir.

[1] 31 and 32 Vict., c. 101, sect. 28.
[2] 10 and 11 Vict., c. 47.
[3] Menzies, 802.
[4] Sect. 23.
[5] Sect. 23.
[6] 31 and 32 Vict., c. 101, sect. 48.
[7] *Ibid.*, sect. 101, schedule (W), No. 2.

writ showing the *tenendas* and *reddendo* of the lands in which his ancestor died infeft, and pays or tenders to the superior such casualties or duties as he may be entitled to demand.[1] A writ or precept is not assignable, and it falls by the death of the grantee before infeftment under it.[2] Prior to the Lands Transference Act, 1847,[3] a precept of *clare constat* fell by the death of the granter or grantee before infeftment under it. A Crown writ of *clare constat* or a precept from Chancery can be obtained only on production of a decree of general or special service. The Crown writ or precept is available as a warrant of infeftment to the grantee only till the first term of Whitsunday or Martinmas after its date.[4] A precept or writ of *clare constat* is not a competent mode of completing the title of one who is not at the time of granting it the immediate heir of a person who has died infeft in lands.[5]

Writ or precept not assignable.

Crown writs or precepts of *clare constat* obtained on production of service.

How long available as warrant to grantee.

V. PETITIONS UNDER CONVEYANCING ACT, 1874, SECT. 10.— It has already been stated that a personal right to every estate in land descendible to heirs vests, without service or other procedure, in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, whether such person died before or after the commencement of the Conveyancing Act, 1874, provided the heir was alive at the date of the commencement of the Act, if the ancestor died before that date (1st October 1874). The personal right, the Act provides, is transmissible in the same manner as a personal right to land under an unfeudalised conveyance. How the title of an heir to, or a disponee of, a proprietor of any lands vested only with such a personal right is completed, is shown in section 10 of the Act, which is in these terms:—

Estates vest in heir without service.

> "A title of an heir to, or disponee of, a proprietor of any lands who was neither infeft nor served, but vested only with a personal

Completion of title when deceased heir had a personal right.

[1] 31 and 32 Vict., c. 101, sect. 101, schedule (W), No. 1.
[2] *Ibid.*, sect. 103.
[3] 10 and 11 Vict., c. 48, sect. 15.
[4] 31 and 32 Vict., c. 101, sect. 86.
[5] Bell's Prin., sect. 1819.

> right to such lands, by virtue of this Act, or of any person acquiring right from such heir or disponee, may be made up in like manner as if the person making up a title had held a disposition from the proprietor last infeft in the lands in favour of his immediate successor therein, and a disposition and assignation from each heir or disponee, if any, intervening between such immediate successor and the person so making up a title in favour of his immediate successor therein; and such title may be made up in manner following, viz.:—The heir or disponee or other successor making up such title shall present to the Sheriff of Chancery, or to the sheriff of the county where the lands are situated, a petition which may embrace several separate lands or estates, and may be in the form of schedule E hereto annexed, or as nearly in that form as the circumstances in each particular case will permit, setting forth the name of the proprietor last infeft, a description of the lands, or a valid reference thereto, and the names, and, so far as known, the designations of every proprietor having only a personal right therein, whether by succession, bequest, gift, or conveyance, who has intervened between the proprietor last infeft and the petitioner, and also setting forth the petitioner's own right to the said lands; and on the decree pronounced on said petition finding the facts therein set forth proved, and that the petitioner is entitled to be infeft in the said lands, being extracted in one or several extracts, and on such extract decree or decrees, as the case may be, being recorded in the appropriate Register of Sasines, the petitioner shall be held to be duly infeft in the said lands contained in the extract or extracts so recorded. Such petition shall be presented, published, and carried through in all respects as if the same were a petition for special service under the now existing law; and the extract decree or decrees on such petition, as the case may be, shall be equivalent to a decree of special service, and when duly recorded as aforesaid in the appropriate Register of Sasines, shall have the same effect as regards the lands therein contained as an extract decree of special service duly recorded under the now existing law."

The provisions of this section regarding the completion of a title of an heir are not imperative. Therefore a person who has come to be the direct heir of the proprietor last infeft, provided there only intervene between him and such proprietor heirs who had only a personal right under section 9, can resort, in completing his title, to any mode formerly competent. Thus, suppose that A, infeft, died; that B, his heir, who survived 1st October 1874, did not expede service; that B's heir, C, did not expede service—then D, the heir of C, can make up a title by petition under the section; or, if he be the heir of A, he, passing over B and C, can make up a title by service, general or special, to A, or by writ or precept of *clare constat* as heir of A.

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If B and C, in the case supposed, had died before 1st October 1874, then D would have completed a title before that date, by special service to A or by writ or precept of *clare constat* as A's heir, and after that date by service, general or special, to A, or by writ or precept of *clare constat* as A's heir. The petition must be used in such a case as the following:— A, infeft, died; B, surviving 1st October 1874, and without taking any steps to complete a title, sells the lands to C. C, in completing a feudal title to the lands, has to use the petition.[1]

VI. CASES OF *HUTCHISON* AND OF *MAULE*.—The distinction between an institute proper and a conditional institute, and the distinction between an institute and a substitute, have been pointed out in a former chapter. In the case of *Hutchison* v. *Hutchison*[2] a proprietor infeft in lands by *mortis causa* undelivered deed disponed to the heirs of his body, equally among them, share and share alike, whom failing, to and in favour of A, B, C, and D, his brothers uterine, equally among them, share and share alike. He died without leaving any heirs of his body; and the Court held that A, B, C, and D were conditional institutes, not substitutes, and that they had right to the property so disponed without service or declarator. "It must now be held as settled," the Lord President said at advising, "for all practical purposes, that when by a *mortis causa* undelivered disposition the conveyance is directly to A *nominatim*, whom failing to B, and A predeceases the granter, B takes as conditional institute, and not as heir either of A or of the granter." "The Court," he also said, "are of opinion that when one by *mortis causa* conveyance in the ordinary form dispones to the heirs of his body, or the heirs-male of his body, whom failing, to a person named, the person so named (there being no heirs of his body then existing) is

[1] See Jur. Styles, vol. i., 322; Mowbray's Hendry's Styles, 158 *et seq.*; Begg's Conveyancing Code, 331 *et seq.*; Sturrock's Analysis, 59.

[2] 1872, 11 Macph., 229.

conditional institute; and if no heirs of the body of the granter come into existence, or existing, predecease him, the condition is purified, and the person named is, on the death of the granter, without qualification or condition, disponee, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponee, without service or declarator." For example, suppose that A, infeft, dispones by *mortis causa* undelivered deed to the heirs of his body, whom failing, to B and the heirs of his body:—(1.) If A has no issue, or if his issue predecease him, B, as conditional institute, records the deed with a warrant of registration in his own favour, or expedes and records, with a warrant, a notarial instrument. (2.) If A has no issue, or if his issue predecease him, and if B predeceases A, but leaves a son who survives A, the son, as conditional institute, can record the disposition with a warrant of registration, or expede and record, with a warrant, a notarial instrument. The notary public who expedes the instrument may require evidence, judicial or other, to prove that the son is the heir of B. (3.) If A has no issue, or if his issue predecease him, and B survives him, and dies infeft or uninfeft leaving a son, then his son is a substitute, and makes up a title as heir by service, or other competent method. (4.) If A was survived by a son, he, as institute, could take infeftment *de plano* on the deed. The case of *Maule*[1] settled that the fiction of a fiduciary fee is only needed till the heir entitled to the proper fee is ascertained, that the fiduciary fee disappears at that moment, and that the proper fee then vests in the heir *as a disponee*. Thus, lands may be disponed to A in liferent only, or in liferent merely, or in liferent allenarly, or in liferent alimentary, and the heirs of his body in fee. A holds a fiduciary fee which disappears at his death, when the heir of his body can be ascertained, and when the proper fee vests in such heir. A may die (*a*) uninfeft, or (*b*) infeft to the extent of the liferent, and, in either event, the heir of his body can record the dis-

[1] 1876, 3 R., 831.

position or a notarial instrument, with a warrant of registration in his own favour. A may also die (*c*) infeft to the full extent of the destination, in which case the sound opinion seems to be that the heir can also record the disposition or a notarial instrument, with a warrant of registration in his own favour.[1]

When granted.

VII. CHARTERS OF *NOVODAMUS*.—When the original charter to lands is lost or is defective, or when it is agreed by parties to make alterations on the original conditions of the feu, the superior, whether Crown or subject, may grant a charter of *novodamus* either to the original vassal, or to his heir, or to a singular successor in the feu. In the narrative of the charter of *novodamus* the cause of granting is set forth, and the clause of warrandice, at least if the superior simply intervenes for the convenience of the grantee, should be from fact and deed only. In other respects the charter of *novodamus* is like the feu-charter.[2] Commutation of casualties may be effected by a charter of *novodamus*, as well as by a discharge in the form of schedule F of the Conveyancing Act, 1874, and an allocation of feu-duties may be effected by a charter of *novodamus*, as well as by a memorandum in the form of schedule D of that Act. Prior to 1st October 1874 a clause of *novodamus* was often inserted in a charter of resignation or a charter of confirmation. To complete his title, the grantee of a charter of *novodamus* either records it, or expedes and records a notarial instrument. The Conveyancing Amendment Act, 1887,[3] makes it incompetent to object to the validity of any charter of *novodamus*, whether granted prior to or after the passing of the Act, on account of the lands therein contained not having previously, and in order to the granting thereof, been resigned into the hands of the superior.

Difference from an original feu-charter.

Commutation of casualties and allocation of feu-duties may be effected by charter of *novodamus*.

Completion of title under charter of *novodamus*.

VIII. DOUBLE TITLES AND SOPITING OF TITLES.—First, a party may have right to lands under two titles which are

First, both titles unlimited.

[1] Dr. Mowbray discusses the difficulty in Hendry's Styles, 152 *et seq.*

[2] Jur. Styles, vol. i., 383.

[3] 50 and 51 Vict., c. 69, sect. 3.

both unlimited, but which contain different destinations, one being the last investiture, and the other a personal title. (*a*) If such party makes up *no* title under either the last investiture or the personal title, or (*b*) if he makes up a title under the last investiture, and neglects the personal title, the personal title, so long as not extinguished or sopited, will govern the succession to the estate. The personal title could be sopited by the party's making up a title under the last investiture, and thereafter executing a new conveyance of the lands, with a destination different from that in the old investiture, or by his getting a new investiture. Possession for the prescriptive period in virtue of an infeftment made up under the old investiture will not extinguish the personal title.[1] Second, a party may have a right to lands under two titles, one of which is limited by entail, and the other of which is unlimited. (*a*) If such a party does not complete a title under either the limited or the unlimited title, the limited, so long as not extinguished, will be the *lex feudi*, and govern the succession to the estate. (*b*) If he does complete a title under the unlimited title, and possesses in virtue of his infeftment for forty years, then the limited title will be extinguished by prescription. Before the prescriptive period has run, but not afterwards, any one of the substitutes in the entail can call upon the possessor to make up a title under the limited title.[2]

Sopiting.

Second, one title fettered.

IX. Liability of Heir for Ancestor's Debts.—An heir is not liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds. When an heir has, before renunciation, intromitted with the ancestor's estate, he is liable for his ancestor's debts to the extent of his intromissions, but no further.[3]

[1] See Rankine on Land Ownership, 58, and authorities there cited.

[2] *Ibid.*; and see also Bell's Prin., sect. 2010.

[3] 37 and 38 Vict., c. 98, sect. 12.

X. DISTINCTION BETWEEN HERITAGE AND CONQUEST ABOLISHED.—"The distinction between fees of heritage and fees of conquest," provides the Conveyancing Act, 1874,[1] "is hereby abolished with respect to all successions opening after the commencement of this Act, and fees of conquest shall descend to the same persons, in the same manner and subject to the same rules as fees of heritage."[2]

Illustrative of the contents of this chapter, the following examples may be given :—

EXAMPLE.	HOW TITLE MADE UP.
1. A, infeft in lands, dies. To complete B, his heir's title.	1. B can complete his title in any of these ways :— 1. (1) Special service, B to A. (2) Extract decree, with warrant of registration, recorded. 2. (1) General service, B to A. (2) Notarial instrument, with warrant, recorded. 3. (1) Writ of *clare constat* to B as heir of A, recorded.
2. A, holding an unrecorded conveyance, decree of adjudication, or extract decree of special service, or any title equivalent in law to a conveyance, dies. To complete B, his heir's title.	2. (1) General service, B to A. (2) Notarial instrument on A's unfeudalised title and service, B to A, recorded. In this case B may also record the unfeudalised title in favour of A, with a warrant in his own favour, along with a short notarial instrument, Consolidation Act, 1868—schedule (N)—the instrument referring to the general service.

[1] Sect. 37.

[2] On Conquest, see Bell's Lect., vol. ii., 1075.

EXAMPLE.	HOW TITLE MADE UP.
3. A, infeft, dies. B, his heir, takes no step to complete a title, but survives 1874. To complete the title of C, the heir of B.	3. (1) Petition, expede by C, under section 10 of the Conveyancing Act, 1874. (2) Extract decree under it, recorded. But, in this case, C may still, as before 1874, pass over B, and serve in special or general to A, or obtain writ of *clare constat* as heir of A. See Example 1.
4. A, publicly infeft, dies. B, his heir, expeded a special service, and died prior to *passing* (not commencement) of the Consolidation Act, and uninfeft. To complete the title of C, the heir of B.	4. C passes over B, in whom, on account of his death prior to 31st July 1868, nothing vested, and makes up a title as heir of A, as in Example 1.
5. A, publicly infeft, dies. B, his heir, expedes a general service, and dies before 1874 and uninfeft. To complete the title of C, the heir of B.	5. As feudalised title could not be taken up by a general service prior to 1874. Nothing was, therefore, vested in B. C, passing over B, will make up a title as heir of A, as in Example 1.
6. A, infeft, dies. B, his heir, expedes a general service, and dies after 1st October 1874, and uninfeft. To complete the title of C, the heir of B.	6. (1) General service, C to B, whose service to A since 1874 is equivalent to a *mortis causa* general disposition of the lands by A to B. (2) Notarial instrument on general service, B to A, and general service, C to B, recorded.
7. A dies infeft in lands of X and of Y. B, his heir, expedes a special service as regards the lands of X, and gets a writ of *clare constat* as regards the lands of Y,	7. 1. *Lands of X.* (1) General service, C to B. (2) Notarial instrument on special service B to A, and general service, C to B, recorded.

EXAMPLE.	HOW TITLE MADE UP.
and dies after 1868, and uninfeft. To complete the title of C, the heir of B.	2. *Lands of Y.* If B died prior to 1st October 1874, C passing over B, in whom nothing vested—a writ of *clare constat* falls by the death of the grantee uninfeft—will make up a title as heir to A, as in Example 1. But if B survived that date, C may use petition under the Conveyancing Act, setting forth, *inter alia*, personal right in B *ex lege*, and record extract decree under it.
8. A, publicly infeft, dispones to B by disposition containing procuratory of resignation and precept of sasine. B, base infeft, dies in 1868. C, B's heir, expedes general service to him, and gets a charter of resignation on the procuratory in disposition A to B, and records it. To complete the title of D, the heir of C, prior to 1st October 1874.	8. The general service, C to B, gave C right to the unexecuted procuratory of resignation in disposition A to B, and the recorded charter of resignation gave C a feudal title to the mid-superiority. The property remained vested in B. Therefore D would first make up a title to the mid-superiority by special service and writ of confirmation, or by writ of *clare constat;* and then grant himself a writ of *clare constat* as heir of B, and record it, which would vest the property fee in him. He would then unite the mid-superiority and property fees by recording procuratory of resignation *ad remanentiam* in his own favour.
9. A, infeft, by *mortis causa* undelivered deed dispones to himself, whom failing, B. To complete B's title on the death of A.	9. A having instituted himself, B is a substitute, and makes up a title thus :— (1) General service as heir of provision to A.

EXAMPLE.	HOW TITLE MADE UP.
	(2) Notarial instrument on *mortis causa* disposition and general service, B to A, recorded.
10. A, infeft, disponed by general disposition *mortis causa* to B, who, uninfeft, disponed in the same way to C, who died uninfeft. Both the *mortis causa* general dispositions contained assignations to writs. To complete the title of D, the heir of C after 1874.	10. (1) General service, D to C. (2) Notarial instrument on dispositions, A to B, and B to C, and general service, recorded. It does not matter whether the general dispositions (*a*) were *inter vivos* or *mortis causa;* or (*b*) contained assignations to writs; or (*c*) were granted prior to or after 1st October 1874; Conveyancing Act, 1874, section 29.
11. A, infeft, dispones by *mortis causa* undelivered deed to the heirs of his body, whom failing, to B and the heirs of his body, whom failing, to C. To complete the title (1) of X, A's son, on A's death; (2) of B, if A dies without issue; (3) of Y, B's son, if A dies without issue, and B predeceases him; (4) of C, if A dies without issue, and B predeceases him without issue; (5) of B, if A is survived by an only child X, who dies childless and uninfeft; (6) of B, if A is survived by a son, X, who dies childless and infeft; (7) of Y, son of B, if A dies childless, and if B survives him	11. 1. X, an institute, records the deed or notarial instrument thereon. 2. B, a conditional institute, as above. 3. Y, a conditional institute, as above. 4. C, a conditional institute, as above. 5. B, a substitute, completes a title thus:— (1) General service, B to X, as heir of provision. (2) Notarial instrument on disposition by A, and general service, B to X, recorded.

EXAMPLE.	HOW TITLE MADE UP.
but dies uninfeft; (8) of C, if A dies childless and predeceased by B, but survived by Y, an only son of B, who dies childless and uninfeft.	6. B, a substitute, completes a title as heir of provision in one of three modes set forth in Example 1. 7. Y, a substitute, completes a title thus :— (1) General service, Y to B, as heir of provision. (2) Notarial instrument on disposition by A, and general service, Y to B. 8. C, a substitute, completes a title thus :— (1) General service, C to Y, as heir of provision. (2) Notarial instrument on disposition by A, and general service, C to Y.
12. A, infeft, by delivered deed, dispones to B, whom failing, C, whom failing, to himself. To complete the title of (1) B; (2) of C, if B dies uninfeft; (3) of C, if B dies infeft; (4) of A, if B is predeceased by C, and B dies uninfeft.	12. 1. B, institute, can record deed, or a notarial instrument. 2. C, a substitute, completes a title thus :— (1) General service, C to B, as heir of provision. (2) Notarial instrument on deed by A, and general service, C to B, recorded. 3. C, substitute. See three ways stated in Example 1. 4. A, substitute. (1) General service, A to B.

EXAMPLE.	HOW TITLE MADE UP.
	(2) Notarial instrument on deed by A, and general service, A to B, recorded.
13. A, infeft, dispones to B, who records his disposition in the wrong register. C, the heir of B, finds out the error. A is dead. To complete C's title.	13. B's infeftment is inept. Therefore C completes a title thus:— (1) General service, C to B. (2) Notarial instrument on disposition A to B, and general service, C to B, recorded.
14. A, infeft, dispones to B, who records his deed in the wrong register, and dispones to C, who records, not twenty years ago, his deed from B in the proper register. To complete the title of D, the heir of C.	14. B's infeftment being inept, C's infeftment is also bad. Therefore D will complete his title thus:— (1) General service, D to C. (2) Notarial instrument on dispositions A to B, and B to C, and general service, D to C, recorded.
15. A, infeft, dies. B, his heir, recorded a writ of *clare constat* more than twenty years ago, and died before 1874. C, the heir of B, discovers a fatal intrinsic error in the writ of *clare constat*. To complete C's title.	15. Nothing vested in B on account of error, which, being intrinsic, prescription does not cover. C makes up a title as heir of A, passing over B. See modes under Example 1.
16. A, infeft, dies. B, his heir, expedes special service to him, but dies after 1868 uninfeft. C, the heir of B, takes no step to make up a title, and dies after 1874, nor does D, the heir of C, but D conveys the subjects to E, a stranger. To complete E's title.	16. E must resort to petition under Conveyancing Act, 1874, section 10, and record decree under it.
17. A, holding burgage subjects, feus in 1876 to B, who re-	17. B's charter should have been recorded in the Burgh

EXAMPLE.	HOW TITLE MADE UP.
cords his charter in Register of Sasines applicable to county. To complete the title of C, B's heir.	Register of Sasines, and he died therefore with an unfeudalised title. C completes his title thus :— (1) General service, C to B. (2) Notarial instrument on feu-charter to B, and general service, C to B, recorded in the Burgh Register.[1]
18. A, infeft, dispones by delivered deed to B in liferent, and his heirs in fee, and there is no intention shown in deed that B's liferent is to be a liferent merely. To complete the title of C, the heir of B.	18. If B died (*a*) uninfeft, or (*b*) infeft to the extent of the liferent. (1) General service, C to B. (2) Notarial instrument on deed, A to B, and general service, C to B, recorded. If B died (*c*) infeft in full terms of the destination, C would make up title to B in one of three ways shown in Example 1.
19. A, infeft, dispones, by delivered deed, to B in liferent allenarly, or only, or merely, or alimentary, and to the heirs of his body in fee. To complete the title of C, the heir of the body of B, on B's death.	19. Here B is only a fiduciary fiar. The heir is the real fiar, and he can complete a title as a disponee, whether B dies (*a*) uninfeft, or (*b*) infeft to the extent of the liferent, or (*c*) infeft to the full extent of the destination, by recording, with warrant on his behalf, the deed or a notarial instrument as if there had been no fiduciary fiar at all.
	1.
20. A, holding an unfeudalised title, dispones, by delivered deed, in trust to B, whom	20. (1) Notarial instrument on A's title and deed, A to B, recorded.

[1] Conveyancing Act, 1874, sect. 25.

EXAMPLE.	HOW TITLE MADE UP.
failing, to C. To complete (1) B's title, and (2) C's title, if B dies uninfeft.	2. (1) General service, C to B, as heir of provision in trust. (2) Notarial instrument on A's title, disposition, A to B, and general service, C to B, recorded.

CHAPTER VI.

HERITABLE SECURITIES.

HERITABLE securities may be constituted either (1) by reservation or (2) by constitution, and they may be granted for sums (*a*) already, or (*b*) instantly, or (*c*) to be advanced. Heritable securities—how constituted and for what granted.

BURDENS BY RESERVATION.—A proprietor may sell an estate, making part of the price a burden on the lands. To run with the lands, not only must the burden be put on the lands, but the creditor's name and the sum must be specified, and these particulars must appear on the record. Before the commencement of the Conveyancing Act, 1874, which removed all doubt as to the competency of granting feus of burgage property (section 25), contracts of ground-annual of such property were common. In cases of feus in which subinfeudation has been effectually prohibited by condition made prior to the commencement of the Conveyancing Act, 1874, contracts of ground-annual will still be used where the proprietor desires to secure himself in an annual payment out of the lands. The contract of ground-annual does not create a new feu. In the modern form of the contract there are—(1) an obligation by the purchaser to pay the ground-annual, and to perform the other conditions of the grant; and (2) a disposition by him of a ground-annual furth of the subjects, and of the subjects themselves, in security of the ground-annual.[1] A title under the contract of ground-annual in this form is completed by recording it with two warrants of registration,—one in favour of the

Essentials of a real money burden.

Ground-annuals—when used.

Modern form of contract of ground-annual.

[1] Jur. Styles, vol. i., 132; Bell's Lect., vol. ii., 1157.

disponer, and the other in favour of the disponee. The ground-annual, which takes the place of feu-duty, is declared in the contract to be a real burden; but, unlike feu-duty, if the ground-annual is omitted from the titles for forty years, the real security will be lost in virtue of the negative prescription. The original disponee, in the absence of stipulation to the contrary, is personally liable for the ground-annual, although he disposes of his right to a purchaser; but a purchaser is not personally liable for it, except whilst he remains proprietor of the lands.[1]

How a ground annual differs from a feu-duty.

Conveyance and discharge of real burdens.

The Conveyancing Act, 1874, section 30, deals with the conveyance and discharge of real burdens, and the mode in which an heir makes up a title to them. It is in these terms:—"It shall be lawful to record in the appropriate Register of Sasines any deed, instrument, or writing whereby any real burden upon land is assigned, conveyed, or transferred, or is extinguished or restricted. No deed, instrument, or writing, executed or dated after the commencement of this Act, whereby any real burden upon land shall be hereafter assigned, conveyed, or transferred, shall be effectual in competition with third parties, unless the same is recorded in the appropriate Register of Sasines; and such deed, instrument, or writing shall take effect in competition with third parties only from the date of such registration, and intimation according to the existing law and practice shall be unnecessary when such deed, instrument, or writing is recorded; and real burdens upon land may be assigned, conveyed, or transferred, and extinguished or restricted, and titles thereto may be completed as nearly as may be in the same manner as in the case of heritable securities constituted or requiring to be constituted by infeftment in favour of the creditor as defined by the Titles to Land Consolidation (Scotland) Act, 1868, and the whole provisions, enactments, and forms of that Act and

[1] See *Small* v. *Millar*, 1849, 11 D., 495, rev. 1853, 1 Macq. App., 345; *Gardyne* v. *Royal Bank*, 1851, 13 D., 912, rev. 1853, 1 Macq. App., 358; and *Marshall's Trustee* v. *Macneill and Co.*, 1888, 15 R., 762.

of this Act relative to the assignation, conveyance, or transference and extinction or restriction of bonds and dispositions in security, and other heritable securities constituted or requiring to be constituted by infeftment as aforesaid, and to the completing of titles thereto, and also the forms referred to, as well as the provisions and enactments contained in section 117 of the said Act, shall be taken to apply and shall apply as nearly as may be to real burdens upon land; provided always that securities by way of ground-annual, whether redeemable or irredeemable, shall continue to be heritable as regards the succession of the persons in right thereof; and provided also, that where a real burden upon land shall have been assigned, conveyed, or transferred by any deed, instrument, or writing which has entered the appropriate Register of Sasines, it shall not be necessary to produce to the notary public expeding any notarial instrument applicable to such real burden, or to set forth in such notarial instrument, as a warrant thereof, the deed, instrument, or writing constituting the said real burden; but it shall be sufficient to produce to him, and to specify shortly in such notarial instrument, the deed, instrument, or writing, or the deeds, instruments, or writings, whereby the said real burden shall have been assigned, conveyed, or transferred, and which, or one or more of which, if there are more than one, shall have entered the appropriate Register of Sasines."

Before the enactment of this section it was unnecessary to record an assignation of a real burden; intimation alone sufficed, and the first intimated assignation was preferred in competition.

BURDENS BY CONSTITUTION FOR MONEY ADVANCED.—The most common form of security for money already or instantly advanced is the Bond and Disposition in Security. It contains (1) an acknowledgment of the sum advanced; (2) an obligation to repay either the creditor, his executors or

Bond and disposition in security.

Clauses.

assignees whomsoever, or the creditor and his heirs, excluding executors, the principal sum and interest, with penalties; (3) a disposition, in security of the personal obligation, of the borrower's lands; (4) an assignation to rents; (5) an assignation to writs; (6) a clause of warrandice; (7) a power of redemption; (8) an obligation for the expenses of assigning and discharging the security; (9) a power of sale in default of payment; and (10) a consent to registration for preservation and execution.[1]

In whose favour bond is when money advanced by—(1) trustees; (2) judicial factors; (3) *curator bonis*; or (4) tutors.

If money is advanced by—(1) testamentary trustees on heritable security, the bond and disposition bears that the money is advanced by them, and is taken in their favour as trustees; if by a (2) judicial factor, the bond is in favour of the judicial factor and his successors in office, and his or their assignees; if by a (3) *curator bonis* for a lunatic, the bond is in favour of the lunatic and his executors or assignees whomsoever, or as the case may require, to the lunatic, and his heirs excluding executors; and if by a (4) tutor-nominate or tutor-dative, the bond is in favour of the ward and his executors or assignees whomsoever.[2]

Assignation to rents.

The clause of assignation to rents imports (1) an assignation to the rents to become due or payable from and after the date from which interest on the sum in the security begins to run; and includes a power to the creditor—(2) to insure all buildings against loss by fire; (3) on default in payment to enter into possession of the lands disponed in security and uplift the rents thereof, or to uplift the rents thereof if the lands are not disponed in security; and (4) to make all necessary repairs on the buildings, subject to accounting to the debtor for any balance of rents actually recovered.[3]

Power of redemption.

If a borrower desires to exercise his power of redemption, he, three months either prior to the term of payment in the bond or prior to a term of Whitsunday or

[1] See 31 and 32 Vict., c. 101, sects. 118, 119, as to form and import of clauses.

[2] Mowbray's Hendry's Styles, 226 *et seq.*

[3] 31 and 32 Vict., c. 101, sect. 119.

Martinmas thereafter, gives notarial premonition to the creditor to attend at the place of payment, and receive payment of the loan. If the creditor does not accept payment, the money is consigned by the debtor in the bank specified in the bond, and if no bank is specified, then in one or other of the banks in Scotland incorporated by Act of Parliament or Royal Charter, having an office or branch at the place of payment.[1] According to the Conveyancing Act, 1874,[2] if a borrower cannot from any cause get a discharge on exercising his right of redemption, he may consign the sum due, and thereupon obtain a certificate of discharge from a notary public. This certificate is recorded in the appropriate Register of Sasines, and the effect of the recorded certificate is to disencumber the lands of the debt and of all interest and penalties corresponding thereto. By the Consolidation Act, 1868,[3] before a creditor in a bond and disposition in security can exercise a power of sale, he has—(1) to give notarial notice demanding payment within three months; (2) to advertise, as prescribed by statute, the subjects for sale; and (3) to sell by public roup at Edinburgh, or Glasgow, or at the head burgh of the county within which the lands and others, or the chief part thereof, are situated, or at the burgh or town sending or contributing to send a Member to Parliament, or at the burgh or town which may have previously adopted the General Police and Improvement (Scotland) Act, 1862, or part thereof, which, whether within or without the county, is the nearest to such lands, or the chief part thereof. The subjects are sold under articles of roup, and the creditor grants a disposition to the seller. But the creditor can not only exercise his power of sale, but he may also charge on the personal obligation contained in the bond and disposition in security.[4] By section 122, if there is a surplus from the sale over and above the sum due to the creditor, and the prior creditors if

Course when borrower cannot get a discharge.

Power of sale.

Consignation of surplus of price.

[1] 31 and 32 Vict., c. 101, sect. 119.
[2] Sect. 49.
[3] Sect. 119.
[4] *M'Whirter* v. *M'Culloch's Trustees*, 1887, 14 R., 918; *M'Nab* v. *Clarke*, 1889, 16 R., 610.

Effect of consignation.

any, it is consigned in the bank specified in the articles of roup. The effect of the disposition to the purchaser, after consignation, is to free the lands of the creditor's security and diligence, and of all posterior securities and diligences.[1] But if there is no surplus, a notary public can grant a certificate to that effect, and the combined effect of the recorded disposition, and the certificate when recorded, is to disencumber the lands of the diligence and security of the selling creditor, and of all diligences and securities prior and posterior to the security of such seller.[2]

Provision for disencumbering lands sold when no surplus emerges.

Heritable securities—how far heritable or moveable estate.

The Titles to Land Consolidation Act, 1868,[3] made heritable securities moveable as to the succession of the creditor,[4] unless—(1) they are conceived in favour of heirs, excluding executors, or (2) the creditor in right of the security died prior to the commencement of the Act. Yet, although they are moveable as to succession, they are heritable—*quoad fiscum;* (2) *quoad* rights of husband and wife; and (3) they are not reckoned in the computation of *legitim*.[5] Opinions were expressed in the case of *Hare*, cited below,[4] that the Act makes heritable securities moveable only in cases of intestate succession. Executors may be excluded—(1) by the terms of the bond itself; or (2) when the bond has been recorded, by separate minute recorded; or (3) when the bond has not been recorded, by minute indorsed on the bond and recorded along with the bond. When executors have been excluded in any of these ways, the exclusion may be removed by the creditor recording a minute, or by his assigning, conveying, or bequeathing the security to himself, or any other person, without expressing or repeating such exclusion. What has been stated about the succession to and exclusion of executors from bonds and dispositions in security is applicable to real burdens.[6] Ground-annuals, however, remain heritable in every respect as regards the succession of the creditor.

[1] 31 and 32 Vict., 101, sect. 123.
[2] 37 and 38 Vict., c. 98, sect. 48.
[3] Sect. 117.
[4] See *Hare*, 1889, 17 R., 105.
[5] See *Hodge* v. *Hodge*, 1879, 7 R., 259; *Guthrie, &c.*, 1880, 8 R., 34.
[6] 37 and 38 Vict., c. 98, sect. 30.

Securities upon land, and relative personal obligations, transmit against heirs and disponees.

The Conveyancing Act, 1874,[1] contains the important provision that "an heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration or other deed or procedure; and the personal obligation may be enforced against such person by summary diligence or otherwise, in the same manner as against the original debtor. A warrant to charge may be applied for and validly granted in the Bill-Chamber or in a Sheriff Court, in the form set forth in schedule K hereto annexed, or in a similar form, and all diligence may thereafter proceed against the party in common form. A discharge of the personal obligation of the original or any subsequent debtor, whether granted before or after the commencement of this Act, shall not where the debt still exists prejudice the security on the estate or the obligation as hereby made transmissible against the existing proprietor." Although a disponee binds himself in terms of this section to pay a bond secured over the property conveyed to him, the stipulation does not affect the creditor's right to enforce the personal obligation against the granter of the bond;[2] but when, in the case of transmission of lands burdened with a sum in a bond and disposition in security, the disponee obliges himself to relieve the disponer of that sum, the obligation does not import an agreement in the sense of section 47 of the Conveyancing Act, 1874, entitling the bondholder to sue the disponee directly in a personal action for the sum contained in the bond and disposition in security.[3]

[1] Sect. 47.

[2] *University of Glasgow* v. *Yuill's Trustee*, 1882, 9 R., 643.

[3] *Carrick, &c.* v. *Rodger, &c.*, 1881, 9 R., 242; see also *Ritchie and Sturrock* v. *Dullatur Feuing Company (Limited)*, 1881, 9 R., 358.

How creditor completes title to bond and disposition in security.

A creditor completes a title to a bond and disposition in security by recording it. A heritable security is transferred by assignation, which is also recorded. If the bond or assignation is contained in a deed for further purposes, or in any case where it is not desired to record the whole deed, a notarial instrument may be expede and recorded.

How executor, &c. completes title.

How a title is made up by an executor, heir, legatee, or general disponee is shown in the following table :—

I.—Where Creditor held unrecorded Bond or unrecorded Assignation to a recorded Bond.

(*a.*) *Where Creditor died on or after* 31*st December* 1868, *and Executors are not excluded*—

(1.) Executors nominate or dative duly confirmed ;
(2.) Disponees or assignees of such security ;
(3.) Disponees or assignees of the moveable estate of such creditor under any deed or conveyance, *inter vivos* or *mortis causa ;*

or,

(4.) Legatees of such security

Complete title by—

Notarial instrument recorded under Act of 1868, section 130, sch. (MM).

(*b.*) *Where Creditor died prior to* 31*st December* 1868, *or Executors are excluded*—

(1.) Disponee or assignee or legatee of such security ;
(2.) Disponee or assignee or legatee of the heritable estate of such creditor under any deed or conveyance by him, *inter vivos* or *mortis causa*, or under any testamentary deed or writing by him within the meaning of the 20th section of the Act of 1868 ;

or,

(3.) Heirs, after expeding general or special service ;

Complete title by—

Notarial instrument recorded under Act of 1868, section 130, sch. (MM).

II.—Where Creditor dies infeft in Bond, and Testate.

(*a.*) *Where Executors are not excluded*—

(1.) Executors-nominate duly confirmed ;
(2.) Disponee or legatee of security ;

or,

(3.) Disponee or legatee of moveable estate ;

May complete title by—

(1.) Writ of acknowledgment by debtor recorded,—Act of 1874, section 63 ; Act of 1868, sch. (II.) ;

or,

(2.) Notarial instrument recorded under Act of 1874, section 64 ; Act of 1868, sch. (KK).

(*b.*) *Where the Creditor died prior to* 31*st December* 1868, *or Executors are excluded—*

(1.) Disponee of heritable estate generally

May complete title by—

Notarial instrument under—

(1.) Act of 1874, sect. 64 ; Act of 1868, sch. (KK) ;

or,

(2.) Act of 1868, sect. 19, sch. (L) ;

or,

(3.) Act of 1874, sect. 53, sch. (N).

(2.) Legatee

Completes title by—

Notarial instrument under Act of 1874, sect. 64 ; Act of 1868, sch. (KK).

III.—Where Creditor dies infeft in Bond, and Intestate.

(*a.*) *Where Executors are not excluded—*

Executors-dative duly confirmed

Complete title by—

Notarial instrument recorded under Act of 1868, sect. 126, sch. (JJ).

(*b*) *Where Creditor died prior to* 31*st December* 1868, *or Executors are excluded—*

Heirs

May complete title by—

(1.) Notarial instrument (on extract-decree of service, general or special) recorded under Act of 1868, sect. 128, sch. (JJ) ;

or,

(2.) Writ of acknowledgment by debtor recorded under Act of 1874, sect. 63 ; Act of 1868, sch. (II).

It should be noted that an heir of provision in a heritable bond may complete his title by service.[1]

[1] Hare, 1889, 17 R., 103.

How bond discharged.

Discharge of Bond.—The proper way to extinguish a bond and disposition in security is to record a discharge, a form of which is given in section 132 of the Titles to Land Consolidation Act, 1868. But a bond can also be discharged, partly or wholly, by an unrecorded discharge, by payment, or by *concursus debiti et crediti.* This makes the assignation of a bond only valid for any sum remaining due by the debtor, and shows how advisable it is to get from the debtor an acknowledgment that the sum in the bond remains unpaid before an assignation thereof is taken.

Securities for sums to be advanced.

Cash credit bonds.

Burdens by Constitution for Sums to be advanced.—Heritable securities can competently be given for cash accounts, or for the relief of cautioners in cash accounts, on condition that the principal sum to become due is limited to a certain definite sum, to be specified in the bond, not exceeding the amount of the principal sum advanced and three years' interest at five per cent.[1] It has been decided that a security for a certain sum and three years' interest thereon is a good security under the Act.[2] Another way of constituting a valid security for a future debt is the granting of an *ex facie* absolute disposition with or without a back-bond. After infeftment on an absolute disposition the deed covers all advances made by the disponee under it, either before or after infeftment. That the disposition, although *ex facie* absolute, is held as a security can only be proved by the writ or oath of the holder;[3] but if a writ unequivocally shows a trust in the person of the disponee, it does not require to be probative.[4] "The execution and recording," said Lord Watson in the case of the *Union Bank*,[5] "of an absolute disposition of heritage, qualified by a personal contract in the form of an unrecorded back-letter, for the purpose of creating a security, has the effect of

Absolute disposition with back-bond.

[1] 54 Geo. III., c. 137, re-enacted by 19 and 20 Vict., c. 91, sect. 7.

[2] *Morton* v. *Hunters & Co.*, 1828, 7 S., 172; aff. 1830, 4 W. and S. App., 379.

[3] 1696, c. 25.

[4] *Seth* v. *Hain*, 1855, 17 D., 1117.

[5] *Union Bank* v. *National Bank*, 1885, 13 R., 380; rev. 1886, 14 R. (H.L.), 1.

vesting the full feudal estate in the disponee, and the disponer's interest is thereby reduced to a personal right to have the estate, or the proceeds of its sale, as the case may be, reconveyed or paid to him on payment or under deduction of the secured debts. As regards third parties, who transact with him on the faith of the public records, the powers of the disponee are not affected by the private contract, and he can sell or burden the estate, and can give a valid title to the purchaser or encumbrancer, although the creation of these rights should be in direct violation of the terms of the back-letter. But in a question with the disponer himself, or with persons who through him have acquired an interest in the estate or in the personal contract, the disponee is affected by the back-letter, and is treated as the holder of a mere security. In all such cases the rights of parties must be determined, not according to the form of the disponee's title, but according to the substance of the transaction." In this case it was accordingly held,—where a bank was infeft on an *ex facie* absolute disposition qualified by an unrecorded back-letter, in which the bank agreed to hold the lands in security and until full and final payment of all sums of money due or to become due to it by the disponer, and where by a subsequent deed the disponer assigned to another bank, for onerous consideration, her interest and right of reversion in the lands disponed by the absolute disposition, and this assignation was intimated to the first bank,—that the first bank's preferable claim on the subjects was limited to the advances made prior to the intimation of the assignation, and that the second bank held the lands as security for advances made subsequent thereto. Registration of the back-bond in the Register of Sasines,[1] or the judicial production of it, or a judicial demand for a reconveyance in terms of it,[2] will limit the security to the amount of sums advanced as at the date of any of these acts. Even although it is stated in a back-letter that the absolute disposition has

[1] *Keith* v. *Maxwell*, 1795, M. 1163. [2] Bell's Lect., vol. ii., 1174.

been granted in respect of a certain debt or advance, the security will not be confined to the debt or sum if other advances have been made by the disponee, unless the back-letter specially stipulates that the disposition is a security for certain specific obligations, and for no others.[1]

[1] See *Maitland* v. *Cockerell*, 1827, 6 S., 109; *Russell* v. *Breadalbane*, 1829, 7 S., 767, aff. 1831, 5 W. and S., App., 256; *Tierney* v. *Court*, 1832, 10 S., 664; *Robertson* v. *Duff*, 1840, 2 D., 279; *Nelson* v. *Gordon*, 1874, 1 R., 1093.

CHAPTER VII.

LEASES.

Leases of two classes.

Leases may be divided into two great classes:—I. Those which do not fall under the Registration of Leases Act, 1857.[1] II. Those which do fall under that Act.

Class I.

Class I.—By the Act of 1449, c. 18, a lease of agricultural lands, houses, salmon fishings, or minerals, or whatever is *fundo annexum*, is effectual against the granter thereof and singular successors of the subjects, provided it (1) is in writing, (2) expresses a rent not illusory, (3) contains a definite ish, and (4) is followed by possession. A lease ought to be a probative writing; but an improbative lease may be made valid by homologation or by *rei interventus*.

Heir does not require to make up a title.

Bequest of lease.

The heir of a holder of a lease of this class does not require to make up a title to it. By the Agricultural Holdings (Scotland) Act, 1883,[2] a tenant can, by testamentary writing, bequeath his lease to any person. The legatee has to intimate the bequest within twenty-one days of the tenant's death to the landlord or his agent, who, within one month after the intimation, may object to receive him as tenant. If the landlord objects, the legatee may present a petition to the Sheriff praying for decree declaring that he is tenant as from the date of the death of the deceased tenant. The prayer will be granted, unless the landlord can show a reasonable ground of objection. If the legatee does not accept the bequest, or if the bequest is declared by the Sheriff null and void, the lease descends to the heir of the tenant.

[1] 20 and 21 Vict., c. 26.

[2] 46 and 47 Vict., c. 62, sect. 29.

Class II.

Class II.—Leases falling under the Registration of Leases Act, 1857, and recorded in the Register of Sasines or Burgh Register, as the case may be, are important in these respects:—They are effectual against singular successors of the subjects, whether they have been followed by possession (an essential under 1449, c. 18) or not. They can be assigned, in whole or in part, absolutely or in security, and the holder of an assignation in security is not personally liable to the landlord in any prestations of the lease until he enters into possession of the subjects let, which, in certain circumstances, he is entlitled to do.

Essentials of a long lease.

To have the benefits of the Registration of Leases Act, a lease granted after the passing of the Act must (1) be probative, (2) be for a period of not less than thirty-one years, (3) be recorded at or subsequent to the date of entry therein stipulated, (4) contain the name of the lands of which the subjects let consist or form a part, and (5) except where the subjects let consist of mines or minerals, set forth the extent of the land let, which extent must not exceed fifty acres. The last two conditions are not applicable to leases which were executed before the passing of the Act (10th August 1857), or to leases of property which was held burgage prior to 1st October 1874, or to leases executed in terms of an obligation contained in a lease dated prior to the passing of the Act.

How a title is made up to a long lease is shown in the following table:—

PARTY.	HOW TITLE COMPLETED.
1. Lessee.	1. Records lease with warrant of registration (sect. 1).
2. Assignee of a cedent whose title is a recorded lease or recorded assignation.	2. Records assignation (sect. 3).
3. Assignee of a cedent in right of an unrecorded lease.	3. Notarial instrument expede, setting forth the lease and the titles or series of titles by which he has acquired right to it, and (*a*) the lease and (*b*) the notarial instrument recorded (sect. 5, sch. C).

PARTY.	HOW TITLE COMPLETED.
4. A, having an unrecorded long lease, dies. B, his heir, makes up no title, but assigns lease to C, who, without making up a title, dies. How will D, C's heir, complete a title?	4. (1) General service, D to C; (2) notarial instrument setting forth (*a*) lease, (*b*) B's right thereto *jure sanguinis*, (*c*) assignation B to C, and (*d*) general service, D to C; (3) lease and notarial instrument recorded (sect. 5).
5. Heir of person who has died vested in right of a recorded lease.	5. Writ of acknowledgment recorded (sect. 7); or (1) general or special service, and (2) notarial instrument recorded (sect. 8).
6. Heir of person who has died in right of an unrecorded lease.	6. (1) General service, (2) notarial instrument, and (3) lease and notarial instrument recorded.
7. Heir of person who had right to a recorded lease by an unrecorded assignation.	7. (1) General service, (2) notarial instrument, and (3) assignation and notarial instrument recorded (sect. 9).
8. General disponee of person who has died vested in right of a recorded lease.	8. Notarial instrument recorded (sect. 8).
9. General disponee of person who has died in right of an unrecorded ~~assignation~~ lease.	9. Notarial instrument, expede, and lease and notarial instrument recorded.
10. Adjudger against party or his heir vested in right of a recorded lease or recorded bond and assignation in security.	10. Abbreviate of adjudication recorded (sect. 10).
11. Trustee on sequestrated estate of a person vested in right of a recorded lease or recorded bond and assignation in security.	11. Notarial instrument expede and recorded (sect. 11).
12. Holder of bond and assignation in security over a recorded lease.	12. Records bond and assignation in security.
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